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The September 11, 2001, terrorist attacks left more than human casualties in their wake. The U.S. system of justice suffered unexpected and devastating blows at the insistence of a Justice Department intent on crushing a new threat. The Bush Administration's declaration of a war against terror became the rallying cry—and ready excuse—for unusual measures that struck at the heart of constitutional guarantees.[1] Justice Department officials sought an unprecedented expansion of police powers ostensibly to aid their efforts. They quickly moved to hold an American citizen incommunicado indefinitely without charges,[2] branded him an "enemy combatant,"[3] and thereby denied him access to counsel.

One reason that the Justice Department could so easily thwart constitutional guarantees is that it accurately predicted the dearth of public outcry. The nation simply sat mute. The evangelistic strain of patriotism that had pervaded both the nation and public dialogue stifled critics of the Department's policies who feared being denounced as unpatriotic.[4] But the scant protests may have uncovered an even more disturbing truth: the American public fails to grasp the seriousness of any denial of the right to counsel because that right has been so poorly developed and articulated. In that truth lies a warning—a warning that predates September 11, 2001. The seeds of the public's lack of clarity about the meaning of the right to counsel took hold in 1963 when the United States Supreme Court issued its landmark decision in *Gideon v. Wainwright*.[5] The Court seized the chance to establish the right to counsel for defendants charged with felonies, but then squandered the opportunity to explain the precise

1. *See, e.g.*, George Packer, *Left Behind*, N.Y. Times, Sept. 22, 2002, § 6 (Magazine), at 42 (discussing prosecution of defense lawyer Lynne Stewart based on tape recordings of her cellblock conversations with her client).

2. *See, e.g.*, Michael Isikoff, *And Justice For All*, Newsweek, Aug. 19, 2002, at 32 (discussing case of Jose Padilla, the alleged "dirty bomber").

3. *See Ex Parte* Quirin, 317 U.S. 1 (1942) (discussing the sources and nature of the authority to create military commissions for the trial of enemy combatants); Eric Lichtblau, *Senators Press Ashcroft to Justify Tactics in Terror War*, L.A. Times, July 26, 2002, at A20 (questioning whether the Justice Department uses guidelines to determine who will be treated as an enemy combatant).

4. *See, e.g.*, Gail Russell Chaddock, *Soft Debate Surfaces on Terror War*, Christian Sci. Monitor, Mar. 4, 2002, at 1 (discussing reluctance among Democratic lawmakers to raise doubts about government tactics in the War on Terror).

5. 372 U.S. 335 (1963).

features that made assistance so pivotal. That is not to suggest that *Gideon v. Wainwright* and its progeny[6] did not spawn key changes in the criminal justice system. These decisions championed the right to counsel as a bedrock principle and simultaneously informed the states that lawyers were no longer a luxury in criminal cases. The Court reasoned that just as the government always relied on representation by counsel in safeguarding the interests of the state, the accused had at least an equally compelling right to counsel's assistance in vindicating her interests against the power of the state's accusation. Therefore, generations have rightly celebrated *Gideon* for its contributions.[7]

But *Gideon* has also drawn criticism for what it did not do.[8] The decision left open the critical question of how states might develop a coherent system of representation for indigent individuals charged with crimes.[9] The opinion ignored questions of cost even as it imposed a burden on the states.[10] Even more troubling, the decision failed to define effective representation. The Court simply elected not to explore in any depth those attributes of representation that the accused is constitutionally guaranteed in a criminal prosecution. That omission has contributed to the all too common practice of jurisdictions tolerating and even fostering minimal levels of performance by counsel appointed to represent indigent clients in criminal cases.

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6. *See, e.g.*, Argersinger v. Hamlin, 407 U.S. 25 (1972) (extending right to counsel to misdemeanor cases); Escobedo v. Illinois, 378 U.S. 478, 490-91 (1964) (extending right to counsel to uncharged suspect); Douglas v. California, 372 U.S. 353, 357-58 (1963) (extending right to counsel to direct appeals).

7. *See, e.g.*, Anthony Lewis, Gideon's Trumpet (1964); Yale Kamisar, *The Gideon Case 25 Years Later*, N.Y. Times, Mar. 16, 1988, at A27 (describing the *Gideon* decision as "one of the most popular decisions ever handed down by the United States Supreme Court").

8. In a symposium commemorating the thirty-sixth anniversary of the *Gideon* decision, one of the authors of the petitioner's brief, Abe Krash, in retrospect conceded that the legal team representing Gideon on appeal did not fully appreciate or emphasize a number of issues that give meaning to the right to counsel. He noted that the right to counsel must include competent representation, sufficient funding to mount an effective defense, and that counsel must be present at every stage of the proceedings. *See Gideon – A Generation Later*, 58 Md. L. Rev. 1333, 1352 (1999) (remarks of Abe Krash).

9. *See* Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 Geo. L.J. 2419 (1996) [hereinafter Taylor-Thompson, *Alternating Visions*].

10. *See* Stephen B. Bright, *Counsel for the Poor: The Death Sentence not for the Worst Crime but for the Worst Lawyer*, 103 Yale L.J. 1835, 1870 (1994) (noting that the dream of *Gideon* has not been realized largely because of the lack of funding to "employ lawyers at wages and benefits equal to what is spent on the prosecution"); Richard Klein, *The Emperor* Gideon *Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 Hastings Const. L.Q. 625 (1986) (detailing how the severity of underfunding undermines the Sixth Amendment guarantee to effective assistance) [hereinafter Klein, *The Emperor* Gideon].

In the years following *Gideon*, the Court stitched together a vision of the defense lawyer as adversary to the state in a series of disparate cases in which the Court addressed and identified the rights of an individual accused.[11] Still, the absence in the *Gideon* opinion itself of even the broad outlines of what might serve as a benchmark of representation seems at best short-sighted. What we know with the benefit of hindsight is that the Court missed an important moment to use the *Gideon* decision as a vehicle to shape expectations of what effective representation entails. What we don't know is how the terrain might have shifted had the Court not left states to enunciate these principles in a vacuum. Cautious speculation suggests that had the Court articulated a more textured vision in *Gideon*, today's fight to realize and preserve a right to effective assistance of counsel would not present such an uphill battle.

Tempting as it might be to foist full responsibility for this critical omission on the Court, others share the blame for failing to give genuine meaning to the concept of effective representation. In particular, defense lawyers have been at fault. They have been slow to seize on the importance of explicitly defining and promoting a conception of their practice. While quality representation of the indigent accused has been eagerly championed, particularly by public defenders, defining "quality" has been elusive. Defenders aspire to provide quality in their representation—even publicly claim to provide it—yet they have rarely developed a clear sense of either its constituent parts or how one might measure it. As a start, some public defenders have consciously chosen to assert control over how their offices operate.[12] In so doing, they have defined their offices as alternatives to large unwieldy delivery machines that churn out representation on an assembly line.[13] These offices have either modeled themselves after law firms offering "full service" to indigent clients[14] or have chosen to adopt a community orientation linking

11. The Supreme Court signaled its expectation that defense lawyers would uncover and raise constitutional claims. *See, e.g.*, McMann v. Richardson, 397 U.S. 759, 768 (1970) (noting that for a defendant "who considers his confession involuntary and hence unusable against him at a trial, . . . [t]he sensible course would be to contest his guilt, prevail on his confession claim at trial, on appeal, or, if necessary, in a collateral proceeding, and win acquittal, however guilty he might be"); Miranda v. Arizona, 384 U.S. 436, 444 (1966) (requiring warnings prior to custodial interrogation); Wong Sun v. United States, 371 U.S. 471, 485 (1963) (barring the use of the "fruit" of the government's illegal actions); Mapp v. Ohio, 367 U.S. 643, 655 (1961) (extending the exclusionary rule to the states).

12. *See generally* Taylor-Thompson, *Alternating Visions*, *supra* note 9.

13. *See generally* Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render Ineffective Assistance of Counsel*, 68 Ind. L.J. 363 (1993); Chester L. Mirsky, *The Political Economy & Indigent Defense: New York City, 1917-1998*, 1997 Ann. Surv. Am. L. 891.

14. *See, e.g.*, Emily Barker, *Can He Build a Cravath for the Poor?*, Am. Law., Apr. 1995, at 46 (describing The Legal Aid Society of New York's efforts to create a full-service organization modeled after a private law firm).

individual client needs to those of a broader, similarly subordinated population.[15] But even in these instances, defenders have not sufficiently articulated the protocols of quality defense internally or made the case for the value of their work externally. The defense bar lacks a consistent voice both to give meaning to the right to counsel and to set a high standard for representation. This lack of leadership has led to a troubling void.

In response to this vacuum left by defenders, others predictably have stepped into the breach. The legal profession as a whole attempted to sketch the features of representation through the use of ethical guidelines and the development of professional performance standards.[16] This process generated obvious benefits. Professional codes of conduct permitted the profession at once to exercise some control over the role of counsel and to guarantee some degree of uniformity of conduct at least within a given jurisdiction. But state codes operate principally as regulatory schemes that do little more than catalogue general aspirational goals for the profession and serve as a means of identifying and removing the worst offenders once something has gone awry. A wide variety of practices occupy the space between these extremes, leaving lawyers, clients and the public with the mistaken impression that the role of counsel is wildly variable and fluid.

Sadly, the Supreme Court has often fostered this view. While the Warren Court appeared firmly committed to a path that would provide a roadmap to effective representation, the Burger Court ultimately veered off course by narrowly interpreting the Sixth Amendment right to counsel. In *Strickland v. Washington*,[17] the Court designated the minimal level of representation required in a criminal proceeding, any representation below which would constitute ineffective assistance of counsel. The two-pronged analysis that the Court adopted considers (1) whether the lawyer's performance fell below acceptable levels and (2) whether that performance prejudiced the accused. In essence, the Court set the low bar—or, perhaps more accurately, no bar—for effective assistance.[18]

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15. The Neighborhood Defender Service of Harlem, a community-based defender office established in 1990, emphasizes that its location in the community, use of team representation and focus on long-term needs of clients are the factors that distinguish it from other defender offices. *See, e.g.*, Neighborhood Defender Service of Harlem, *at* http://www.ndsny.org (last visited Feb. 21, 2003).

16. *See, e.g.*, Model Rules of Prof'l Conduct (2002); Model Code of Prof'l Responsibility (1992); A.B.A. Standards for Criminal Justice (1993).

17. 466 U.S. 668 (1984).

18. In an uncharacteristic application of *Strickland*, the Court granted relief in *Williams v. Taylor*, 529 U.S. 362, 398-99 (2000) (noting that federal habeas corpus relief was warranted under 28 U.S.C. § 2254(d)(1) because the state court unreasonably applied *Strickland* in finding counsel's lack of preparation for capital sentencing hearing did not "prejudice" accused). The Court thereafter reverted to its old ways this past term in *Bell v. Cone*, 535 U.S. 685, 122 S. Ct. 1843, 1852-54 (2002)

In formulating this test, the Court may have been less interested in establishing a standard for performance and more concerned with the lack of finality in a system that might permit too much second guessing of lawyers' performances.[19] But the ruling has proved disabling to the right to effective assistance of counsel in practice. The *post hoc* analysis, which encourages the court to defer considerably to counsel's judgment about tactics, has led to the corrosive conclusion that sleeping[20] or drunk lawyers[21] can pass constitutional muster.[22] Thus, the Court has effectively removed any real qualitative baseline.

Elected officials, on the other hand, have been quick to define the representational threshold in quantitative terms. The conventional political maneuver has been for government funding authorities to distill the duty to provide assistance to the indigent accused into an obligation to conduct volume business at rock-bottom prices. With their eyes fixed on ever shrinking funds available to finance the growing obligations of government, these funders carefully and consistently evade the question of quality. Instead, as a matter of routine, they demand that indigent defense service providers set and then meet specific requirements to justify their budget allotments, measuring performance according to the defenders' ability to handle at discounted prices a set number of cases during a fiscal year. Politics and current economic conditions may push defenders to secure a finding of reasonable doubt at a reasonable price, but holding defenders accountable for their budgetary expenditures does not sufficiently consider the loss in quality that such efficiency exacts. Quite obviously, too limited a focus on efficiency can be at odds with efforts to provide quality in representation.

Quality representation demands a more robust definition than that provided in any of the above mentioned contexts. Nearly forty years

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(noting that state court did not unreasonably apply *Strickland* in finding that counsel's performance fell within "the wide range of reasonable professional assistance" notwithstanding counsel's failure to call witnesses and waiver of closing argument in capital sentencing stage of trial).

19. *See Strickland*, 466 U.S. at 689-90.

20. *See, e.g.*, Stephen B. Bright, *Casualties of the War on Crime: Fairness, Reliability and the Credibility of Criminal Justice Systems*, 51 U. Miami L. Rev. 413, 419-20 (1997). The case widely known for the "sleeping lawyer" eventually resulted in a finding of ineffectiveness and a grant of habeas corpus relief. *See* Burdine v. Johnson, 262 F.3d 336 (5th Cir. 2001) (en banc), *cert. denied sub nom.* Cockrell v. Burdine, 122 S. Ct. 2347 (2002). Thus, in the most extreme cases, reversal of a conviction may ultimately be possible even under *Strickland*'s restrictive standard.

21. *See, e.g.*, People v. Garrison, 765 P.2d 419, 440 (Cal. 1989) (finding that a lawyer was not ineffective even though he consumed large amounts of alcohol each day of the trial and was arrested for drunk driving on his way to the courthouse).

22. *See* Kenneth B. Nunn, *The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process—A Critique of the Role of the Public Defender and a Proposal for Reform*, 32 Am. Crim. L. Rev. 743 (1995) (observing that since *Strickland*, less than five percent of ineffectiveness claims have been successful at the circuit court level).

ago, Herbert Packer observed, "[t]he kind of criminal process we have depends importantly on certain value choices that are reflected, explicitly or implicitly, in its habitual functioning."[23] Using this measurement to assess the current state of the American criminal justice system, one comes to an inescapable conclusion: our system of justice routinely manifests tremendous disdain for effective indigent criminal defense. Like many other issues, questions about whether the right to counsel will continue to operate as a cornerstone of the American justice system have crystallized in the period following the September 11 events. To withstand the political attacks in all their variety, defense lawyers need to articulate and convey not only what constitutes quality in the delivery of defense services, but also why that brings value to our system of justice. Public defenders may be uniquely situated to craft this definition given that they will likely experience repercussions from the current fashionable political stance: a stance that pretends that the nation can and must suspend certain fundamental rights as it maneuvers through the current terrorist crisis.

To do this, defenders may need to draw inspiration from other professions to glean lessons about the mechanics of identifying and promoting quality in the delivery of their services. These other disciplines may well offer helpful models as defenders tackle the challenge of defining the essence of that which they provide. But more to the point, defenders will need to survey other defenders in the field, paying particular attention to those individuals and offices most often identified by lawyers and clients as delivering the most comprehensive and innovative service. Quality is obviously a multidimensional construct. But an examination of the component parts of these approaches to lawyering may begin to form the framework for identifying the key attributes in a system that is relentlessly committed to quality representation for individuals charged with crimes.

Any meaningful effort to define quality in representation will likely generate debate about the wisdom of pinning down a specific set of expectations for defense counsel to fulfill. Defenders, like other professionals, will most likely wish to avoid being subject to any additional scrutiny. To address this concern, any real discussion of whether defenders should engage in a process of defining their role should also address the optimal level of specificity necessary to identify and promote quality in representation. The defense community and clients should pose hard questions about the appropriate measures of quality once it has been defined. Critical thought and honest and open dialogue should surround the means of enforcing the norms of representation. However, if the environment

23. Herbert Packer, *Two Models of the Criminal Process*, 113 U. Pa. L. Rev. 1, 5 (1964).

following the September 11 events offers an accurate rather than atypical gauge, these questions will not garner the attention they deserve unless the defense community insists on addressing them publicly. More troubling still, the absence of robust discussion could hasten the erosion of the right to counsel. While resolving such questions will not likely produce cozy consensus or easy answers, the debate itself can issue a powerful public message that the guarantee of effective representation forms a core principle in our system of justice.

The aim of this article is to begin the debate. Part I revisits the history of the right to counsel and suggests that the Court's internal struggle over federalism locked the *Gideon* decision into a framework, one in which the Court could only define the components of the right to counsel in the broadest terms. The unappreciated cost of the Court's lack of specificity has been a legacy of ineffective assistance that has now shifted the onus of defining the components of the right to counsel to the indigent defense community. Part II briefly examines the effort by the health care profession to wrest its objectives away from outside parties and to establish for itself what constitutes quality in health care. This section concludes by speculating about ways that the indigent defense community might similarly undertake the task of defining and embracing quality.

I. *GIDEON*: THE MISSED OPPORTUNITY TO STRIKE A CHORD FOR EFFECTIVE ASSISTANCE

Most talk about the right to counsel properly acknowledges the pivotal role that *Gideon v. Wainwright* plays in extending that right to the states. Until the Court held in 1963 that states must provide counsel to an accused in serious cases, the picture had been bleak, particularly in the South.[24] Indigent defendants could anticipate the daunting prospect of—and predictable fate that flowed from—defending themselves against skilled lawyers representing the interests of the state. With the stroke of a pen, the Court converted this landscape by mandating the appointment of counsel to advocate for the individual accused of a crime in state courts. In that instant, the Supreme Court reshaped the system of justice in state criminal trials.

Or so it seemed. For all its significance, the *Gideon* decision has fallen short of the goal the Court seemed intent on achieving. This problem emerges from twin sources in the clarity of hindsight. First,

24. At the time that the Court decided *Gideon*, five southern states did not assure the appointment of counsel for the poor except in capital cases. Eight states appointed counsel without the benefit of either statute or court rule in urban areas, but appointment in rural areas often did not take place. Thirty-seven states formally required the provision of counsel in serious cases. *See* Lewis, *supra* note 7, at 132; Yale Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of An Accused*, 30 U. Chi. L. Rev. 1 (1962).

the decision set out to overrule *Betts v. Brady*[25] and necessarily turned its attention backward to justify its departure from precedent. The *Gideon* opinion today reads more like a retrospective justification for deviating from precedent than a prospective elaboration of the right to counsel, and understandably so. The Warren Court had its work cut out for it given the legal context in which the Court announced the *Gideon* decision. The Court had previously made clear that it appreciated the fundamental necessity of counsel in a criminal case. The injustices that flowed from the absence of counsel appeared thoroughly incompatible with constitutional protections. But while the right to counsel applied without limitation in federal courts,[26] the Court had divided on how far it could extend that right to the states. Some explanation of the circuitous path to this decision, therefore, seemed appropriate. This concentration on *Betts*, however, may have pigeonholed the Court's thinking, leading it to place more emphasis on the need to appoint counsel rather than on the symbiotic relationship between counsel and a fair trial.

Second, the price that unanimity in the decision appears to have exacted was that the opinion speaks only in general, uncontroversial terms about the right to counsel. Earlier in *Betts*, the option of applying the right to counsel in state courts had plunged the Justices further into the turbulent debate over federalism and whether the Fourteenth Amendment incorporated and applied the entire Bill of Rights to the states.[27] Perhaps seeking to avoid the deeper currents that divided the Court in *Betts*, the *Gideon* opinion skimmed the surface, electing to extend the right to counsel to the states without much elaboration. Given the significance of the ruling applying this fundamental principle to all states, one might have expected the Court to engage in the sort of painstaking analysis that it expected of courts, counsel, and legislatures as they gave substance to the right to counsel. Instead, the Court provided little more than nominal guidance to the states.[28] The opinion used broad strokes when fine lines might have added precision to the ruling's message. In the end, mapping the constitutional coordinates to a state mandate for counsel was anything but direct or simple.

A. *Gideon's Chosen Path: Establishing the Right to Counsel*

The journey to *Gideon* begins with *Powell v. Alabama*.[29] The decision reversed the convictions of eight young African American men who had received death sentences for the rape of two white women in Scottsboro, Alabama. In every respect, the trial remains

25. 316 U.S. 455 (1942).
26. *See* Johnson v. Zerbst, 304 U.S. 458 (1938).
27. *See Betts*, 316 U.S. at 462, 465, 474-75.
28. *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963).
29. 287 U.S. 45 (1932).

the paradigmatic case of a rush to judgment. Within days of the near lynching of the accused men by an angry mob of citizens in Scottsboro, they were brought to trial and convicted. At the time of arraignment, the trial court judge, unwilling to saddle any individual member of the bar with the unpopular task of defending the young men, appointed the entire bar. Needless to say, no one felt singularly responsible for the investigation or preparation of the case. Indeed, on the morning of trial, only one local lawyer stepped forward indicating a willingness to defend the men, and another lawyer, unfamiliar with Alabama law, agreed to assist. In each of three trials completed in one day, an all white jury convicted the men and returned death sentences.

The combustible combination of race and violence created a sense of urgency in reversing these sentences. In the midst of the notoriety attending the facts of this case, the Court enunciated the principle that the rigors of due process under the Fourteenth Amendment required more than that which occurred in this case. The assistance that counsel provided here—having been appointed the day of trial—was the functional equivalent of no assistance at all. The Court stressed that the defendants lacked the aid of counsel "in any real sense," because the trial court had denied them assistance during the "most critical period of the proceedings . . . that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important."[30] Appointing all members of the bar could not satisfy the due process requirements when, as in this case, counsel could not "investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional."[31] The facts made abundantly clear that the trial court had failed to furnish that which the right to counsel envisioned: effective aid as a prerequisite to a fair trial. Thus, cases that presented similar circumstances to those in *Powell* required the appointment of counsel. At that moment, *Powell*'s focus seemed to signal the Court's intention to unite the right to counsel with the content of that which counsel should provide: "effective and substantial aid."[32]

But the moment would pass. The extreme facts of *Powell* that compelled the Court to take action, in turn, permitted lower courts to treat the case as unique. The *Powell* decision began to lay the groundwork for applying the right to counsel to the states, yet the newly announced standard seemed tied to capital cases. The Court noted,

30. *Id.* at 57.
31. *Id.* at 61.
32. *Id.* at 53.

> All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.[33]

In carving out the right in capital cases, the *Powell* decision captured and advanced the critical connection between representation by counsel and a fair trial. However, the question of the application of the right to counsel in non-capital state cases remained open and unanswered for the next ten years.

In the interim, the Court took steps to give the right to counsel meaning in federal courts. The Sixth Amendment made plain that courts could not preclude an accused from securing counsel in her defense.[34] Indeed, until *Johnson v. Zerbst*[35] that is precisely how courts interpreted the right. What had resulted from this reading of the Sixth Amendment's protection was a caste system based on wealth that undermined the safeguards of the right to counsel. Only the wealthy accused could exercise the Sixth Amendment guarantee because only she could afford to hire counsel. In response to this iniquity in 1938, the Court began at once to level the playing field and to elaborate on the Sixth Amendment's reach. *Johnson v. Zerbst* extended the right to counsel to indigent defendants by informing courts that the Sixth Amendment operated as a jurisdictional bar to both a valid conviction and sentence if the court failed to "complete the court—as the Sixth Amendment requires—by providing counsel for an accused who is unable to obtain counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake."[36]

In coming to grips with the complexities involved in the criminal process, the Court was staking out the substantive terrain for the right to counsel. The Court explained that the Sixth Amendment right to counsel expanded the court's obligation beyond protecting the "feeble

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33. *Id.* at 71.

34. *See* David Cole, No Equal Justice 65 (1999); Lucas A. Powe, Jr., The Warren Court and American Politics 380 (2000); Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 Iowa L. Rev. 433, 438-59 (1993) (discussing the history of the Sixth Amendment); Bruce J. Winick, *Forfeiture of Attorneys' Fees under RICO and CCE and the Right to Counsel of Choice: The Constitutional Dilemma and How to Avoid It*, 43 U. Miami L. Rev. 765, 786-89 (1989).

35. 304 U.S. 458 (1938).

36. *Id.* at 468.

minded" defendant, as *Powell* had articulated the duty, to include the average individual accused of a crime.[37] The right to counsel

> embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty.... That which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious.[38]

Thus, the Court seemed to imbue the right to counsel with crucial components—training and professional skill that would operate to protect the accused against the deprivation of her life or liberty. Not only did *Johnson v. Zerbst* continue to clarify and elaborate on the meaning of the right to counsel, but it also seemed a logical step forward from *Powell*. If the Sixth Amendment guarantee contemplated the assistance of counsel as an essential component of fairness in a trial, then all defendants in federal court were entitled to that protection.

The Court's first misstep occurred when it considered the application of this right to state proceedings. Although the Constitution required the appointment of counsel in federal courts to "insure fundamental human rights of life and liberty,"[39] the Court in *Betts v. Brady*[40] concluded that the Sixth Amendment did not express a rule "so fundamental and essential to a fair trial, and so, to due process of law" that it must apply if the prosecution occurred in a state court.[41] The Court rejected a rigid application of the right to counsel, arguing instead that the Fourteenth Amendment contemplated a more fluid application of the Sixth Amendment guarantee in state proceedings. The sticking point was the question of whether the United States Constitution should restrict the authority of the states to decide whether particular prosecutions warranted the appointment of counsel. The Court acknowledged that there might be a particular set of contingencies under which the Sixth Amendment guarantee would compel the appointment of counsel—when the court determined that to proceed without counsel would be "shocking to the universal sense of justice."[42] But within those patently inexplicit parameters, states could freely determine on a case by case basis when they should appoint or deny counsel.

Betts, thus, deviated from the Court's previous path, which Justice Black's dissent denounced as ill-conceived.[43] Although Justice Black's

37. *Id.* at 462-63 (referring to *Powell*, 287 U.S. at 68-69).
38. *Id.*
39. *Id.* at 462.
40. 316 U.S. 455 (1942).
41. *Id.* at 465.
42. *Id.* at 462.
43. *See id.* at 475-76 (Black, J., dissenting).

views firmly embraced the position that the Fourteenth Amendment incorporated all of the safeguards of the Bill of Rights, he conceded that the majority of the Justices did not share his perspective. He insisted, however, that, given the Court's precedents, the *Betts* holding withdrew from the accused the very protections that the Court had previously deemed critical. In his effort to work past the Court's internal dysfunction, he tried to make clear the magnitude of this ruling's error as he reiterated the dangers the Court's prior decisions had noted when lower courts denied counsel to an accused. He then reminded the majority of the inexorable link between counsel and the fairness of a criminal proceeding. Quoting *Powell*, he echoed the view that, without the guiding hand of counsel, the innocent accused would not know how to establish innocence.[44] But Justice Black's views were to remain relegated to the dissent until *Gideon*. Over his objections, the Court approved a double standard between federal and state prosecutions.

The resulting dual approach to the right to counsel may have said more about the Court's own struggle over federalism and incorporation of the Bill of Rights than it did about the Court's definition of the right to counsel. In practice, *Betts v. Brady* soon became an anachronism. Those states that were loathe to recognize a right to appointment of counsel, not surprisingly, found that their cases did not present the sort of special circumstances[45] that required appointment of counsel.[46] But in every case that came before the Supreme Court from 1950 to 1962, the Court managed to find a violation of due process when states had refused to appoint counsel in criminal trials.[47] The problem was that not every case involving a denial of counsel reached the Supreme Court. In the end, the Court's right to counsel jurisprudence seemed schizophrenic at best.

As *Betts* came increasingly under fire,[48] the Court seemed poised to reconsider it. Chief Justice Earl Warren made clear that he believed

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44. *Id.* at 476 (Black, J., dissenting).

45. *See* Palmer v. Ashe, 342 U.S. 134, 135 (1951) (elaborating on the *Betts* rule suggesting that state courts can deny counsel unless there are "special circumstances showing that without a lawyer a defendant could not have an adequate and a fair defense").

46. *See generally* Ralph Ruebner et al., *Shaking the Foundation of* Gideon*: A Critique of* Nichols *in Overruling* Baldasar v. Illinois, 25 Hofstra L. Rev. 507, 514 n.33 (1996).

47. *See* Leo Katcher, Earl Warren: A Political Biography 443 (1967).

48. Justice Douglas cited to a Letter to the Editor by Erwin N. Griswold and Benjamin Cohen printed in *The New York Times* on August 2, 1942, at page 6, in his dissent in *Bute v. Illinois*. 333 U.S. 640, 677 n.1 (1947). In this letter, it is argued that

> "at a critical period in world history, Betts v. Brady dangerously tilts the scales against the safeguarding of one of the most precious rights of man. For in a free world no man should be condemned to penal servitude for years without having the right to counsel to defend him. The right of counsel, for the poor as well as the rich, is an indispensable safeguard of freedom and justice under law."

that an accused in a state prosecution had a right to counsel and his clerks remained on alert for a vehicle through which the Court might overrule *Betts*.[49] Initially, *Carnley v. Cochran*[50] seemed to present such an opportunity. The case, which began as a Florida state trial, raised the question of the fairness of a trial without the assistance of counsel. Even Justice Frankfurter, a staunch states' rights advocate, indicated in discussions on the *Carnley* case that he was inclined to overrule *Betts*. He objected, however, to using *Carnley* for this purpose because he considered it an "unsavory case."[51] The Court, therefore, considered and reversed *Carnley* within the confines of the *Betts* special circumstances rule, finding both that Mr. Carnley had been illiterate and that the trial raised issues of legal complexity.

Gideon then emerged as the case in which the Court would revisit the *Betts* ruling. In assigning the case to Abe Fortas,[52] who would argue for Mr. Gideon, the Court foreshadowed its primary focus: the Court specifically asked Fortas to address whether the Court should overrule *Betts*.[53] While this issue did not ultimately formulate Fortas's central argument, it did signal how the Court conceived of the case. In the end, the opinion would look backward rather than forward in its effort to unfold the right to counsel in state proceedings. In so doing, it would negate its own message by failing to prepare states to understand and fully implement the constitutional safeguards embodied in the right to counsel.

1. Appreciating the Context of the Opinion

The Court may simply have misread its task in *Gideon*. Widespread agreement that an accused should receive the assistance of counsel in state trials seemed to exist. Forty-five states in one form or another already appointed counsel in serious cases.[54] Even state prosecutors appreciated the need for defense counsel in criminal proceedings. Twenty-two states' attorneys general filed an amicus brief in *Gideon* urging the Court to mandate the appointment of counsel in state felony proceedings.[55] Given this backdrop, the Court may have perceived that the states did not need it to lay out a detailed

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Id.

49. Bernard Schwartz, Super Chief: Earl Warren & His Supreme Court—A Judicial Biography 458 (1983).

50. 369 U.S. 506 (1962).

51. *Carnley* involved allegations of intra-family child sexual abuse. Justice Frankfurter explained that it was impossible to "imagine a worse case, a more unsavory case to overrule a long standing decision." Powe, *supra* note 34, at 382.

52. *See* Lewis, *supra* note 7, at 48.

53. *See id.*

54. Brief for Petitioner at 29-30, Gideon v. Wainwright, 372 U.S. 335 (1963) (No. 155).

55. Brief of Amici Curiae Attorneys General, Gideon v. Wainwright, 372 U.S. 335 (1963) (No. 155).

elaboration of what the Court's newly announced right to counsel envisioned. This evidence suggests that the Court read its principal objective as explaining its deviation from precedent.

Interestingly, the parties had a more expansive take on their charge. The briefs did not treat the mistaken approach in *Betts* as a peripheral issue, but they did not pretend that it was the sole question worthy of attention. Instead, the petitioner's brief crafted the argument for counsel in state criminal cases by locating it firmly within fairness guarantees.[56] Fortas' brief set out to show that the right to counsel did not apply merely when the accused presented special needs or raised special concerns. The benefits and protection that counsel provided applied to the average case—"in every criminal prosecution."[57] To establish this, the brief illustrated why the right to counsel was so fundamental. Without the assistance of counsel, the accused could not avail herself of important procedural safeguards.[58] Fortas explained that "[a]n uncounseled defendant manifestly cannot be expected . . . to be a master of the intricacies of the law."[59] In the process of explaining the deficiencies in a case handled by an unrepresented accused, the brief drafted a blueprint of what the right to counsel ensures.

Fortas was treading on familiar terrain. As an experienced lawyer himself, he unashamedly explained what the lawyer brings to the adversary process. He began by clarifying that which Clarence Gideon was *not* claiming. Gideon was not asserting extreme youth, inexperience, mental incapacity or illiteracy as the reasons for his inability to defend himself.[60] Nor was he blaming the trial judge. Although the judge obviously could not serve as Gideon's defense counsel, he had endeavored to provide what protection he could from the bench.[61] Despite these facts, the brief asserted, Gideon still suffered harm because he lacked the assistance of counsel. The brief documented the issues that a lawyer would have recognized and raised, but that had escaped notice by Gideon's untrained eye.[62] In an appendix, Fortas listed these as the consequences of the failure to afford Gideon counsel.[63] Fortas noted the availability of an intoxication defense on the question of intent, the court's improper interference with Gideon's right to confront and cross-examine

56. *See* Petitioner's Brief at 13, *Gideon* (No. 155).
57. *Id.*
58. *Id.* at 17.
59. *Id.*
60. *Id.* at 12. In oral argument, Fortas indicated that Gideon performed well for a layman. Gideon actively participated in his trial, conducted cross-examinations and addressed the jury. Fortas contended, however, that no lay person, no matter how intelligent, can conduct her own defense effectively. *See* Lewis, *supra* note 7, at 170.
61. *See* Petitioner's Brief at 13, *Gideon* (No. 155).
62. *See id.* at 13-14.
63. Petitioner's Brief app. B at 49-50, *Gideon* (No. 155).

government witnesses, Gideon's lack of awareness of his right to examine prospective jurors during voir dire and to exercise strikes for cause, the improper use of hearsay and opinion testimony without objection, and that the court had not informed Gideon of his right to make requests regarding final jury instructions or to be informed of the court's charge before final argument. He also observed that Gideon made no statement at the time of sentencing.[64] By implication, Fortas suggested that a lawyer would have handled all of these issues differently and, thereby, would have protected Gideon's due process rights.

The brief acknowledged the federalism concerns dividing the Court, but suggested that the course adopted in *Betts* posed the real threat to state sovereignty. In an innovative move, Fortas suggested that *Betts* had authorized more intrusive supervision of state court actions than a firm rule would permit. The *Betts* standard compelled federal courts to engage in "intensely factual, subjective and *post-facto*" analyses of state criminal proceedings.[65] A firm rule would clarify the states' obligations and curtail the federal court practice of intervening to review the state courts' appointment decisions. Fortas then conceded that states should retain the authority to devise methods by which they would comply with the constitutional guarantee, but he urged the Court to lay out the governing principle. In defining that principle, Fortas again advanced a compelling argument that ultimately did not find its way into the opinion. He explained that the standard being applied was an entitlement to "*effective* legal aid [for] all persons accused of a serious offense who do not competently and intelligently waive such assistance."[66]

Even the amicus filed by the twenty-two state attorneys general recognized and elaborated on the meaning of the right to counsel.[67] Perhaps the experience of trying cases in the absence of opposing counsel—coupled with the prospect that any such convictions could face reversal on appeal—operated as incentives for these prosecutors to assert a position in support of Gideon.[68] But whatever their motivations, their brief linked the right to counsel with due process, arguing that due process is "perhaps, the least frozen concept of our law—the least confined to history and the most absorptive of powerful

64. *Id.* at 50.
65. *Id.* at 12.
66. *Id.* at 35 (emphasis added).
67. *See generally* Brief of Amici Curiae Attorneys General, *Gideon* (No. 155). The amicus brief filed by the American Civil Liberties Union in the case focused principally on *Betts* and its impact on defendants in the state system. *See generally* Brief of Amici Curiae American Civil Liberties Union, *Gideon* (1963) (No. 155).
68. Counsel for the state of Florida had requested that they file an amicus in support of the state's position, but the state attorneys could not support Florida's position. *See* Lewis, *supra* note 7, at 151-55.

social standards of a progressive society."[69]

Although the Court had considered the question of the process that was due in state courts in the *Betts* case, the amicus urged the Court to revisit its assessment given that due process evolves through "the gradual and empiric process of 'inclusion and exclusion.'"[70] Where *Betts* had gone wrong, they asserted, was in the decision to contract the right to counsel rather than to expand it to fit the needs of the criminal justice system in the twentieth century.[71] Interestingly, although the attorneys general had not discussed or exchanged briefs with Fortas prior to filing,[72] the amicus brief raised parallel points about the qualities that counsel brings to the adversary process. The amicus argued that the right contemplates that counsel will help the accused understand how to plead and testify at arraignment, file motions, examine prospective jurors, testify or remain silent, make objections, propose instructions, and challenge any invalidity in a sentence. Perhaps more than any other brief, the amicus filed by the attorneys general looked prospectively beyond establishing the right to counsel and considered the practical impact of the ruling. In effect, the brief accepted as given that the right to counsel extended to the states.

The attorneys general then delved deeper into the issues that states would need to address given that premise. Competency of appointed counsel and the extent to which funding would be available to defense counsel to make the adversary system operate fairly were the issues the brief cited as looming problems.[73] By advising the Court of the more pressing issues that states were tackling in complying with the right to counsel, the amicus offered the Court an opportunity to provide guidance. As importantly, the brief served as notice that the Court needed to make clear what it was imposing on the states: adherence to the Constitution means more than providing a warm body who happened to be a lawyer.

2. Past as Text, Not Prologue

The *Gideon* opinion in the end stands as a vindication of Justice Black's position that the Court had erred in *Betts*. Justice Black had dissented in *Betts* and now, as author of the majority opinion in *Gideon*, had the opportunity to align the Court's jurisprudence in this area with his views. The opinion in *Gideon*, which Justice Black wrote and completed quickly,[74] essentially tracked the language of his *Betts*

69. Brief of Amici Curiae Attorneys General at 4, *Gideon* (No. 155) (quoting Justice Frankfurter's opinion in *Griffin v. Illinois*, 351 U.S. 12, 20-21 (1956)).

70. *Id.* at 5.

71. *Id.*

72. Lewis, *supra* note 7, at 148.

73. *See* Brief for Amici Curiae Attorneys General at 21, *Gideon* (No. 155).

74. Schwartz, *supra* note 49, at 460 (noting that Justice Black circulated a draft of

dissent. The opinion extended the right to counsel to the states, making clear that states had the obligation to appoint counsel when an indigent accused lacked the wealth to provide her own. But the opinion deliberately maintained a narrow focus:[75] it did not identify how far the right extended or what it envisioned accruing to the accused's benefit.[76]

Given the magnitude of the ruling, the fact that the Court gave such short shrift to the meaning of the change it imposed remains surprising. Just two terms earlier, when the Court decided *Mapp v. Ohio*,[77] the Court seized the moment to lay out in some detail its view that the Fourth Amendment's exclusionary rule extended to the states. In that more elaborate opinion, the Court explained what it contemplated as a result of this newly applied ruling. The *Gideon* decision, however, did not engage in like analysis. The opinion gave passing comment to key elements of representation, such as challenging an indictment, undertaking cross-examination, and understanding the rules of evidence, particularly recognizing the difference between evidence that is and is not admissible. But the decision made these references in the context of discussing *Powell v. Alabama*.[78] Ultimately, the Court acknowledged the importance of the role of counsel in criminal proceedings, but focused more on the necessity for appointment than on an explanation of why the accused and the criminal process needed defense lawyers.

This focus may have reflected the Court's intent to signal to lower courts that its jurisprudence in this area had merely resumed the proper track. Justice Black cited cases leading to *Gideon* to show the trajectory to this decision and that the Court was now restoring the line of precedents from which *Betts* had abruptly broken.[79] In so doing, he may have meant to incorporate by reference the substance behind the rulings and the right to counsel. However, the fact that Justice Black did not elaborate on the substance of the right remains, at best, a curious choice given that the Court was formulating and announcing a new rule. One might have expected some normative discussion about that which defense counsel would bring both to the adversary process and to the accused in state court proceedings.

But perhaps such specificity posed too perilous a path if the Court hoped to issue a unanimous ruling. The more Justice Black elaborated on what the right entailed—focusing perhaps on when the right began and ended and to which offenses it might apply—the more likely some of the Justices might have taken issue with the decision and split from

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the opinion within two weeks of the Justices' vote).

75. *Id.*

76. *Id.*

77. 367 U.S. 643 (1961).

78. Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963).

79. *Id.* at 344.

the majority. Particularly given Justice Black's views of incorporation, he ran the danger of pushing the Court further than it was prepared to move at that point. An opinion that generally articulated the governing principle, therefore, offered less with which the Justices could quibble.[80] For a Court that preferred to issue unanimous rulings when making broad changes affecting states,[81] foregoing a detailed examination of the specific features of the right may have seemed a small sacrifice.

The upshot of this choice is that much was lost in the trade. In the end, the opinion most clearly enunciated the principle that an accused had the right to appointed counsel if she could not otherwise afford one and had not waived the right to be so represented. The Court eloquently observed:

> Our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble idea cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.[82]

The Court seemed less clear in its commitment to the concept of the Sixth Amendment right to counsel as embodying a guarantee of quality in representation. In fact, when a differently comprised Court had the opportunity to consider the substance of the Sixth Amendment guarantee in state proceedings, the Justices failed to see a link between the right and quality.[83] The Court made the provocative and sadly prophetic assertion that "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation."[84] Thus began the states' race to the bottom in providing little more than technical compliance with the Sixth Amendment guarantee of counsel.

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80. Although, interestingly, the brevity of the opinion led Justice Harlan to object to the way that the majority treated the *Betts* precedent, complaining that it deserved a more decent burial. *Id.* at 349 (Harlan, J., concurring).

81. *See, e.g.*, Richard Kluger, Simple Justice: The History of *Brown v. Board of Education* & Black America's Struggle for Equality 694 (1976) (discussing the Chief Judge's concern that the Court issue a unanimous ruling in the landmark desegregation case *Brown v. Board of Education*); Schwartz, *supra* note 49, at 94 (noting that while Chief Justice Warren expressed to potential dissenters in *Brown v. Board of Education* his sensitivity to the problems that the decision would present the South, Warren remained "quite firm on the Court's need for unanimity on a matter of such sensitivity").

82. *Gideon*, 372 U.S. at 344.

83. *See* Strickland v. Washington, 466 U.S. 668, 689 (1984).

84. *Id.*

B. *The Path Not Chosen: Making the Right to Counsel Meaningful*

The temptation in looking back at any decision aided by hindsight is to blame the decision makers for failing to be sufficiently prescient about events that would unfold. Without imposing the burden of clairvoyance on the Court, though, there remain particular observations that the Court could have made in light of precedents, the information before the Court, and the Court's apparent ambitions. The Court had more than rough evidence that a gulf could extend between the normative goal and the empirical reality following a pronouncement of a new rule with which the states would need to comply.[85] Appreciating this dynamic, the Court certainly understood the importance of explicitly laying out that which the ruling contemplated and demanded.

Precision about the core ingredients of the right to counsel would have left states with less room to exercise discretion and to deviate from the principle being announced. By pinning down the expectations embedded in the right to effective counsel, the Court could have set a meaningful threshold. To be sure, even precise statements about the substance of the right to counsel would not alone have transformed deeply-felt but divergent perceptions of the need for such a ruling or of the importance of the right. One cannot realistically expect massive transformations in public thought simply upon a ruling by the Supreme Court. The fact remains, however, that clarity about the right to counsel would have offered a place for courts and litigants to begin the painstaking process of altering conduct and eventually shaping attitudes. If the Court's intent was to generate understanding rather than grudging compliance, then, at a minimum, it would have proved a prudent investment to outline why the right to counsel mattered. The Court may have had legitimate concerns about delineating the precise point at which the right to counsel attached, but those worries did not relieve it of its obligation to explain the process the right afforded. Ultimately, the Court may have missed the mark because it lost sight of its audience.

Or perhaps one should say audiences. The Court appears to have underestimated the potential breadth of its audiences. Justice Black certainly appreciated that the opinion needed to address lower courts in explaining the reasons that *Betts* had failed to offer a workable approach to the assignment of counsel in state proceedings. But perhaps out of a combination of deference to the states and fear that intruding too much on their authority would threaten the opinion's unanimity, Justice Black seemed to have forgotten that the decision's

85. Kluger, *supra* note 81, at 698 (discussing that the Justices who were initially reluctant to join the Court's decision in *Brown v. Board of Education* realized that even a single dissent could give those inclined to disagree with the ruling "grist for making trouble").

message needed to reach beyond that narrow band. The decision would also serve to instruct defense counsel of the critical role they played in bringing fairness to the process. It would clarify for state funding authorities the state's obligation to devise a system that provided counsel for those who could not afford their own. As importantly, it would inform future generations about that which the average accused had the right to expect and demand from the exercise of the right to counsel. A more fully realized opinion would not have locked in a singular conception of the role of counsel or its limits. Rather, it would have begun to lay a more solid foundation for the future development of the role of counsel in the criminal justice system.

Instead, the Court's decision misjudged the political landscape onto which the decision would be overlaid. Granted, in retrospect, the *Gideon* decision turned out to be an enormously popular Warren Court decision, aided no doubt by Anthony Lewis' much celebrated book *Gideon's Trumpet* which put a face on the ruling.[86] When Hollywood cast Henry Fonda in the role of Clarence Gideon, the American public may have warmly envisioned the accused and embraced the outcome.[87] But it is unlikely that most Americans viewed the average accused criminal quite so sympathetically. The Court's mandate was thus broader than it imagined. It needed to make the case that even when politically unpopular, the right to counsel serves a critical function in a free society. Having counsel available not only checks the power of the state on behalf of the guilty, but operates as a crucial safeguard for all who might face charges in our courts. Providing a meaningful safeguard to every accused also meant addressing the economic implications of the right to counsel for states. In hindsight, it is hard to imagine that the opinion could have missed the massive economic impact of providing counsel in all serious cases and that this price ticket threatened the meaningful implementation of the guarantee.[88] The new mandate to states had the potential to be read as an invitation to lower standards of performance as a necessary side-effect of providing counsel to large numbers of indigent defendants. The Court could have expressed its appreciation for the limits on state resources given the various and competing demands on a finite financial pot while still making clear that the Sixth Amendment guarantee had weight and meaning in the process of dispensing justice. Even in the course of noting the real financial constraints that states would encounter, the Court could have made plain that it expected more than a cosmetic adherence to its ruling. But instead of acknowledging this difficulty, the Court simply ignored this impact.

86. Lewis, *supra* note 7.
87. Gideon's Trumpet (Republic Studios 1980) (starring Henry Fonda).
88. *See, e.g.*, Taylor-Thompson, *Alternating Visions*, *supra* note 9, at 2426 n.31.

1. Anticipating the Issue of Ineffectiveness

Looking back at the Court's opinion, it is clear that more needed to be said to avert the practice that has become all too common in many states: tolerating ineffectiveness of counsel.[89] One can confidently assume that the Justices who issued the *Gideon* decision never contemplated—and would most likely revile the notion—that a sleeping lawyer or one under the influence of drugs would satisfy the dictates of its ruling.[90] Rather, the Court expected active participation in the criminal process by defense counsel, not simply physical presence.

In outlining what defense counsel adds to a criminal proceeding, the Court established the fundamental underpinnings of the concept of the right to counsel. The opinion, however, needed to give more explicit expression to its view of the substance of the right to provide meaningful guidance to lower courts and states. For example, effective assistance had meaning that was essential to a fair trial. The Court should have made plain that assigning any person with a license would not sufficiently comply with the Court's intent.[91] Rather, if counsel were to provide a "guiding hand,"[92] she would need to have sufficient qualifications to handle the complex issues raised by the case. In the context of explaining why the accused without counsel cannot be assured a fair trial, the Court could have noted that the unrepresented individual would lack the ability to defend herself with the special skill and training that a competent lawyer would possess.

The Court understood that the defense lawyer's role involved completing the adversarial system,[93] but in driving home the centrality of this role, the Court needed to describe the details of the role more thoroughly. The adversarial process contemplates a battle between two strong combatants, not an ambush. This formulation of the role implies that defense counsel serves a critical function: that of vigorously fighting the power of the state. The defense lawyer's role is not neutral or passive. Indeed, the Court had in previous precedents

89. *See, e.g.*, Klein, *The Emperor* Gideon, *supra* note 10, at 662.

90. *See, e.g.*, Tippins v. Walker, 77 F.3d 682 (2d Cir. 1996) (finding that although counsel had slept during trial, the claim of ineffective assistance lacked merit because the court could not tell how long he had slept, what portions of the testimony he had missed, or that the lawyer committed any errors resulting in prejudice to the accused); People v. Badia, 552 N.Y.S.2d 439, 440-41 (App. Div. 1990) (finding that lawyer who used heroin and cocaine throughout trial still met the standard of effective assistance of counsel).

91. *See* Green, *supra* note 34, at 433, 438-59 (criticizing the tendency among courts to view as qualified anyone licensed to practice law rather than someone who has acquired the skills and legal knowledge recognized as necessary to provide competent representation to a criminal defendant).

92. Powell v. Alabama, 287 U.S. 45, 69 (1932) (cited with approval in Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963)).

93. *See* Johnson v. Zerbst, 304 U.S. 458, 467 (1938).

articulated quite convincingly that a judge could not substitute for able counsel.[94] Rather, the zealous fight on behalf of the accused formed the core of the role of counsel. Given the complexities of the criminal process even in 1963, effective assistance contemplated, at a minimum, communication skills, competence in investigation, and mastery of the art of advocacy at the trial and sentencing stages. Each of these dimensions of the lawyer's role was before the Court as part of the record[95] and presented opportunities through which the Court could fairly comment.

Making such comment would not have involved the kind of intrusion into states' authority that would run head-on into the Court's pre-packaged views on federalism. The Court would not have needed to dictate the nature of the lawyer's qualifications, nor would it have needed to draft performance standards or furnish a checklist for lawyer's conduct. Rather, by explaining the ways in which lawyers in criminal courts had become "necessities, not luxuries,"[96] the Court's decision could have proved more instructive to all the audiences that would ultimately read and rely on the opinion.

A look at the Warren Court cases over the next decade reveals a Court willing to telegraph to defense counsel information about their role. Decisions by the Court ultimately identify when the right to counsel attaches.[97] Later opinions explore the types of police activity that raise constitutional questions and thereby provide direction to defense lawyers about the sorts of conduct to which they should be alert in safeguarding clients' rights.[98] Of course, because *Gideon* predates many of these decisions, perhaps it is too much to expect that the Court could have fashioned an elaborate guide to defense conduct. But simply including a vision of counsel as a vigorous advocate for the accused would have laid a floor beneath which defense lawyers—and future considerations of effectiveness—could

94. *See Powell*, 287 U.S. at 61. The Court in *Powell* stated:

> But how can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that in the proceedings before the court the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conference between counsel and accused which sometimes partake of the inviolable character of the confessional.

Id.

95. Abe Fortas had moved to include the entire record of trial as part of the Supreme Court submission. *See* Petitioner's Brief at 5, *Gideon* (No. 155).

96. *Gideon*, 372 U.S. at 344.

97. The Court did not until this very Term extend the *Gideon* mandate to "any criminal prosecution, 'whether classified as petty, misdemeanor, or felony that actually leads to imprisonment even for a brief period,' ... [or that leads to] a suspended sentence that may 'end up in the actual deprivation of a person's liberty.'" Alabama v. Shelton, 535 U.S. 654, 122 S.Ct. 1764, 1767 (2002) (citations omitted).

98. *See supra* note 11 and accompanying text.

not easily slip.[99] In so doing, substandard performance might have been seen appropriately as the functional equivalent of no counsel at all.

2. Heading off Perfunctory Compliance

Any effort in the *Gideon* decision to dictate how states should comply with the ruling could have opened the opinion to attack by many of the other Justices who had voted to support it. However, the amicus for the states' attorneys general offered a viable approach that the court could have used to quiet this dissention. The amicus recommended that the Court articulate the nature of the guarantee and then let the states devise their own methods for putting this ruling into practice.[100] The states then would be free to elect whether they wished to establish public defender systems, assigned counsel programs or some other model for the provision of counsel. No matter what system they chose, though, the Court would have mandated that at a minimum such programs would need to safeguard the accused's right to a fair trial.

In explaining the reasons that courts should appoint counsel to the indigent accused, the Court again missed the opportunity to give guidance to the states. The opinion could have examined this obligation more fully. Obviously, an indigent accused lacks the financial leverage to place demands on counsel. The poor defendant cannot pay more to get more. But the Court could have used this instance to point out that while the state had no obligation to eliminate the relative economic differences between the wealthy defendant and the indigent accused,[101] it should pay attention to the ways the state financed the prosecution in determining the amount of funds necessary to mount an effective defense. The Court noted that

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99. The Court did at least this much four years later in explaining the right to counsel for juveniles in *In re Gault*, 387 U.S. 1 (1967). In that case, the Court stated that

> [t]he juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child "requires the guiding hand of counsel at every step in the proceedings against him."

Id. at 36 (quoting *Powell*, 287 U.S. at 69).

100. *See* Brief of Amici Curiae Attorneys General at 3, *Gideon* (No. 155).

101. *See* Griffin v. Illinois, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring in judgment). Justice Frankfurter noted that

> a State need not equalize economic conditions. . . . But when a State deems it wise and just that convictions be susceptible to review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted indigent persons, forsooth erroneously convicted, from securing such a review merely by disabling them from bringing to the notice of an appellate tribunal errors of the trial court which would upset the conviction were practical opportunity for review not foreclosed.

Id.

"[g]overnments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime."[102] Without dictating the precise formulas for making funding determinations, the Court could have drawn the connection between the need to provide funding on both sides to reach the constitutional goal of fairness in the process.

The states also needed guidance on the process of appointment. Obviously, specifying the particular mechanisms states should employ to appoint counsel could have run afoul of states' authority. However, insisting that, no matter which system states chose, the structure should have basic safeguards that ensure compliance with the Constitution would have served as a meaningful guide without stepping on the states' sovereignty. The Court appropriately observed that the fact of appointment could not legitimately depend on an individual's economic status.[103] Exercise of a right so fundamental could not be surrendered to such a variable. Recognizing this, the Court could easily have gone on to explain that the quality of representation an individual accused received should also not be contingent on personal wealth and mandated adequate funding levels for the implementation of the defense function.

As importantly, the Court could have commented on the independence of the defense function. By highlighting independence, the Court might have changed the system of patronage in which appointments of defense attorneys become dangerously linked to pleasing the appointing judge.[104] Similarly, reminding states of the importance of prompt appointments would have been in keeping with precedent and might have underscored the importance of this principle. Ensuring that the defense system did not become captive to the court either in appointment or performance seemed a key component of the Court's fairness argument. Such observations would not have led the Court into the improper role of managing the affairs of states. Instead, the Court's guidance on these issues would have enabled states to understand the expectations for a system that complied with constitutional guarantees.

3. Conveying the Centrality of the Right to Counsel

The Court may have been so preoccupied with its own ideological controversy over incorporation that it did not allow itself the time or room to anticipate future debates on the right to counsel. Nevertheless, the Court should have foreseen the harm that would flow from a state's failure to comply with its ruling. Speaking plainly

102. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).
103. *Id.*
104. *See, e.g.*, Richard Klein & Robert Spangenberg, The Indigent Defense Crisis (1993).

about those potential dangers could have proved instructive to the larger public audience that the decision would ultimately reach. The *Gideon* ruling did not need to answer every question about the right to counsel. Later cases would ultimately extend the reach of the Sixth Amendment guarantee to other aspects of the process and to misdemeanors.[105] But the states' experience with funding indigent defense and tolerating less than effective assistance stands as a painful reminder of the cost of failing to provide some clarity about the meaning of the right to counsel. The shameful legacy of *Gideon* may be the gradual but real erosion of the right to counsel in all cases.

In giving the right substance, the Court could have emphasized the importance of maintaining a check on governmental power. Defense lawyers in the Court's vision served a vital role in limiting the intrusion of government and guarding against overzealous prosecution not just on behalf of the guilty, but on behalf of anyone who might face prosecution.[106] Explaining that exercising this right was key to the individual's ability to enjoy other fundamental rights would have underscored publicly the centrality of the defense lawyer's role in ensuring that justice is served. Such a statement would have demonstrated that states should view the role of counsel with some measure of deference rather than as something with which states could easily dispense. Expressing the degree to which due process depended on the effective performance of counsel for the accused could have more positively shaped the ways that states, bar associations, courts and funders viewed the role of defense counsel.

Instead, the Court's failure to articulate the due process model that the Court envisioned paved the way for a crime control model of criminal process that seemed to require and depend on a perfunctory role for counsel.[107] If one proceeds from the premise of presuming the guilt of the accused, or more charitably, presuming the overriding importance of moving a large volume of cases, then all process that follows from the individual's arrest can be half-hearted. One can abide inadequate assistance in the form of sleeping lawyers,[108] lawyers who fail to investigate cases or present defenses,[109] or who otherwise

105. *See* Argersinger v. Hamlin, 407 U.S. 25, 36-37 (1972) (extending right to counsel to misdemeanors); United States v. Wade, 388 U.S. 218, 237 (1967) (extending right to counsel to post-indictment lineup); Miranda v. Arizona, 384 U.S. 436, 444-45 (1966) (extending right to counsel to custodial police interrogation); White v. Maryland, 373 U.S. 59, 60 (1963) (extending right to counsel to preliminary hearings).

106. *See Gideon*, 372 U.S. at 344.

107. *See, e.g.*, William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 Yale L.J. 1, 31-35 (1997) (noting deficiencies in funding which lead to under-litigation).

108. *See, e.g.*, McFarland v. State, 928 S.W.2d 482, 505-06 (Tex. Crim. App. 1996).

109. *See, e.g.*, People v. Gaines, 473 N.E.2d 868, 876 (Ill. 1984) (following *Strickland v. Washington*, 466 U.S. 668 (1984), the Illinois Supreme Court held that defense lawyer's failure to present mitigating evidence at sentencing phase of capital trial did

operate as walking violations of what one would imagine the Sixth Amendment anticipated. Had the Court recognized the broader foundational role of the opinion, it might have chosen to explain in some detail to future generations why the right mattered. The Court had the chance to do this precisely because the United States was not experiencing a crisis in which the right to counsel might be subject to attack or question. Obviously, it is not the role of the Court to anticipate every possible circumstance under which the right to counsel might face challenge. But within the boundaries of enunciating a principle given these facts, it could have made clear under what circumstances that right is significant and why. Unfortunately, it opted to allow the states to determine for themselves the substance of what the Sixth Amendment guarantees. Consequently, the right remains under attack.

The next section explores what defense lawyers can do in light of these developments. If the role of counsel is to have meaning, defense lawyers will have the obligation to define what the role promises and to develop ways to measure when individuals are delivering—or failing to deliver—that which is required.

II. REDUCING THE DISSONANCE: EMBRACING QUALITY AS THE MEASURE OF EFFECTIVE ASSISTANCE

The domestic war on terrorism has already given rise to substantial dilutions in the procedural rights of individuals.[110] The Justice Department's approval and use of secret detentions and military tribunals has exhibited, at best, a jaundiced view of the role of defense lawyers in our system of justice.[111] Officials elected to safeguard a constitutional system have been chipping away at its protections under the guise of fighting a new enemy in innovative ways and the indigent defense community has been slow to step forward to steer the dialogue in directions more consistent with constitutional requirements. Now more than ever, the indigent defense community needs to seize the moment and the national stage to formulate and articulate a vision of what defense lawyers do, why they do it and why what they do has value. Defenders simply cannot afford to wait for quality in representation to be defined for them and their clients by courts, politicians or the public.

Too often in the past, defenders have merely waited for others to shape the laws and practices that govern the ways that individuals

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not necessarily prejudice defendant).

110. *See generally* William J. Stuntz, *Local Policing After the Terror*, 111 Yale L.J. 2137 (2002) (discussing how Fourth and Fifth Amendment rights are affected by the war on terrorism).

111. *See generally* Jordan J. Paust, *Antiterrorism Military Commissions: The Ad Hoc DOD Rules of Procedure*, 23 Mich. J. Int'l L. 677 (2002).

accused of crime will be treated in the criminal justice system.[112] They have operated principally as reactive strategists. Their responses to policies that infringe on cherished liberties have been vigorous and creative, but they have not tended to take the lead in setting the criminal justice agenda to prevent the approval of such policies in the first instance. In recent years, though, defenders have taken nascent steps to reverse that pattern.[113] They have begun to assume a more active role in addressing legislative agendas, in working collaboratively with communities to tackle criminal justice issues, and in carving out a role for themselves and their offices as criminal justice players.[114] If defenders now cede to others—politicians, prosecutors or courts—the task of defining that which lawyers should provide clients in criminal cases, they run the risk that these other players may place emphasis on issues of cost or on that which is minimally required. In so doing, these other actors may miss or undervalue the essential features of effective representation that defenders and their clients know matter in the lawyer-client relationship. Worse still, the right to counsel may be deemed dispensable in times of crisis unless defenders vigorously work to establish that the right to counsel is not a constitutional nicety open to sacrifice without consequence.

The task of identifying and defining the fundamentals of representation is well within the expertise of defenders in collaboration with their clients. Defenders know the technical ingredients of meaningful assistance. Clients can fill out that definition by offering important insights into that which they need and expect from the representation. Of course, such consultation occurs infrequently, although it would seem an obvious first step. All too often, choices that will directly affect the lives of poor people and people of color occur with little or no consultation with those very individuals.[115] Instead, courts, policy makers and sometimes even defense lawyers presume to know what is needed without

112. *See generally* Taylor-Thompson, *Alternating Visions*, *supra* note 9.

113. *See generally* Cait Clarke, *Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 Geo. J. Legal Ethics 401 (2001) [hereinafter Clarke, *Problem-Solving Defenders*]; Kim Taylor-Thompson, *Effective Assistance: Reconceiving the Role of the Chief Public Defender*, 2 J. Inst. Stud. Legal Ethics 199 (1999) [hereinafter Taylor-Thompson, *Effective Assistance*].

114. In 2000, a group of chief defenders responded to this need by forming what was then the Chief Defenders Council and later became the American Council of Chief Defenders, a section of the National Legal Aid and Defender Association. They meet regularly and operate as a unit to address national criminal justice policy making, to promote fair justice systems and to ensure quality legal representation to individuals accused of crime. *See* National Legal Aid and Defender Assoc., History of NLADA, *at* http://www.nlada.org/About/About_HistoryNLADA (last visited Feb. 6, 2003).

115. *See, e.g.*, Gerald P. López, *An Aversion to Clients: Loving Humanity and Hating Human Beings*, 31 Harv. C.R.-C.L. L. Rev. 315, 315-16 (1996) [hereinafter López, *An Aversion to Clients*].

discussion.[116] But given the importance of this right, defenders must consult with their clients and insist that their clients' voices and views factor into any definition of what the right to counsel encompasses.[117]

Asserting such control over the definition of the role of counsel is crucial. Regardless of minimal requirements that courts might establish to avoid an ineffectiveness claim, defenders have it in their power to insist that they hold themselves to a higher standard of performance. Public defender offices at the federal and state level, assigned counsel programs and contract providers can set as an ambition the achievement of a level of performance that values quality in representation and resists invitations to provide less. These programs can set this level of performance through the implementation of standards of performance and measures.[118] Most importantly, the objective should not be to police or penalize, but to recognize that which defense lawyers have the potential to provide and then to set about improving any representation that falls short of those standards.

Obviously, expecting defenders to add to their plates the task of defining their role and establishing performance standards to ensure quality asks a lot. Already, the overwhelming majority of defenders struggle to provide the best service within their power in spite of caseload constraints and resource limitations.[119] But to be able to defend against future incursions into the right to counsel that flow from reduced funding, case overload, and assorted policies targeting crime, defenders will need a clear definition of what they provide and why the public can and should expect quality defense representation.

And yet even if defenders agree that they are willing to undertake this additional task, holding themselves out against a standard of quality is not risk-free. Who makes the determination when someone has or has not met those standards? What protections will the defender have that the standards will operate as measures to improve

116. *See, e.g.*, William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. Miami L. Rev. 1099, 1105 (1994) (criticizing progressive scholars for not acknowledging that lawyers cannot avoid imposing their own views on their clients).

117. *See, e.g.*, Kenneth B. Nunn, *The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process—A Critique of the Role of the Public Defender and a Proposal for Reform*, 32 Am. Crim. L. Rev. 743 (1995).

118. *Cf.* Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an* Ex Ante *Parity Standard*, 88 J. Crim. L. & Criminology 242, 275 (1997) (suggesting that developing performance standards may not improve legal representation given that effective representation requires more than minimal compliance with a checklist of activities to be taken on behalf of a client).

119. *See* John B. Arango, *Defense Services for the Poor*, 7 Crim. Just., Spring 1992, at 42; Clarke, *Problem-Solving Defenders*, *supra* note 113, at 403; Andy Court, *Is There a Crisis?*, 15 Am. Law., Jan.-Feb. 1993, at 46; Robert L. Spangenberg & Tessa J. Schwartz, *The Indigent Defense Crisis Is Chronic*, 9 Crim. Just., Summer 1994, at 13, 13-14.

the quality of representation rather than to punish those who are deemed below the standard? Although these questions will need to be addressed, they should not derail the effort to ensure that quality is infused in the representation that clients receive in criminal cases.

As a whole, defenders want to provide exemplary service to their clients.[120] They openly embrace quality as a right that their clients deserve. But defining quality—beyond a vague sense of knowing it when one sees it—presents the real challenge. At a minimum, quality representation must mean that the lawyer's aid enhances the ability of individuals accused of crimes to receive representation that satisfies their basic needs and assists them in avoiding future legal entanglements.

Some defenders have already begun the task of identifying and defining quality in representation. Over the last few decades, defenders have participated in a variety of efforts sponsored by the ABA[121] and the National Legal Aid and Defender Association ("NLADA")[122] to think hard about that which defense lawyers should provide. More recently, between 1991 and 2001, the Harvard University Kennedy School of Government hosted the Executive Session on Public Defense ("Executive Session").[123] Thirty participants, including state public defender leaders, assigned counsel managers, one prosecutor, a legislator, a social worker, a journalist and criminal justice experts, attended a series of three day meetings focused on identifying critical issues in indigent defense. What emerged? In defining what it meant to provide quality representation, the members of the Executive Sessions agreed that zealous representation to individual clients is an essential threshold.[124] The participants recognized that clients are depending on lawyers to facilitate their interaction with a system that may otherwise be

120. *See generally* Barbara Allen Babcock, *Defending the Guilty*, 32 Clev. St. L. Rev. 175 (1983); Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 Harv. L. Rev. 1239 (1993) [hereinafter Ogletree, *Beyond Justifications*].

121. *See* ABA Standards for Criminal Justice § 5-1.1 (1993); IJA-ABA Standards for Juvenile Justice: A Summary and Analysis Part I (1980).

122. Compendium of Standards for Indigent Defense Systems (2000), *available at* http://www.ojp.usdoj.gov/indigentdefense/compendium/welcome.html (last visited Feb. 6, 2003); Defender Training and Development Standards (1997), *available at* http://www.nlada.org/Defender/Defender_Standards/Defender_Training_Standards (last visited Feb. 6, 2003); Standards for the Administration of Assigned Counsel Systems (1989), *available at* http://www.nlada.org/DMS/Documents/998926188.407/Blackltr.doc (last visited Feb. 6, 2003).

123. I attended these sessions as a participant. *See* Executive Session, *at* http://www.ksg.harvard.edu/criminaljustice/executive_sessions/espd.htm (last visited Feb. 6, 2003).

124. *See* Cait Clarke & Christopher Stone, *Bolder Management for Public Defense: Leadership in Three Dimensions*, Nov. 2001, *available at* http://www.ksg.harvard.edu/criminaljustice/executive_sessions/espd_Clarke_Stone.pdf (last visited Feb. 6, 2003) [hereinafter Clarke & Stone, *Bolder Management*].

incomprehensible and hostile.[125] But while individual representation does and should figure centrally in the defense lawyer's work, the Executive Sessions participants concluded that quality representation needs to extend beyond the individual client.[126] Given the context in which they operate—the courtroom and the larger community—defenders need to develop a broader definition of quality representation, one that envisions defenders engaging in a public education role with the criminal justice community and general public.[127] And defenders need to engage in collaborative efforts designed to increase fairness in the ways that we address crime.

Similar efforts have been undertaken by federal and state defender offices that have proved in other instances to be trend setters in the manner in which they perceive and perform their roles, and by smaller, community-based offices that have set about to re-imagine the work of the defense lawyer and to defy trends.[128] These efforts can offer a guide into the process of identifying the component parts of quality in service and ideas about the methods for measuring whether it has been provided. By looking at the best of what defenders do, one can begin to build a framework that includes the features necessary to bring about quality in representation. Armed with that framework, the defenders can then set about devising tools to measure compliance with those standards. Above all, the standard of quality must remain flexible enough to change with the times, to develop as knowledge develops and laws change. It must be broad enough to encompass the various skill sets that lawyers as good problem solvers bring to the table. And it must include clients' views and perceptions about representation in understanding the nature of the problems to be addressed and to develop effective means to address those problems in conjunction with the client.

In any effort to develop a framework for identifying the components of a quality product, stepping outside one's field to glean lessons from others who have undertaken a similar task can be enormously helpful. The medical profession's recent experience with

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125. *Id.*

126. *See, e.g.*, Mark H. Moore et al., *"The Best Defense Is No Offense": Preventing Crime through Effective Public Defense*, Working Paper No. 02-07-03, Apr. 2002, *available at* http://www.ksg.harvard.edu/criminaljustice/publications/best_defense.pdf [hereinafter *"The Best Defense Is No Offense"*].

127. *See generally* Taylor-Thompson, *Effective Assistance*, *supra* note 113 (discussing the need for chief defenders to break out of traditionally isolated roles and to begin conceiving of themselves and their offices as key players in the criminal justice system).

128. For example, in February 2002, the Defender Division of the Administrative Office of the U.S. Courts sponsored a two-day conference on quality in indigent defense for federal and state defenders. I served as both consultant and member of the faculty as attendees worked to define quality in representation and to find ways to provide it in both the state and federal criminal justice systems.

managed care environments and the pressure to define that which the profession should be providing offers a rich example.

A. *Lessons to be Gleaned from the Health Care Profession*

The issues that the health care profession has faced in recent years eerily shadow those experienced in the defense community—particularly in indigent defense. The push to contain medical costs has inspired quite controversial efforts to constrict the care provided by medical professionals. Third parties—which include insurers, hospital officials and government players—have attempted to usurp control over the services that medical professionals deliver without having engaged in consultation with doctors or patients about the best ways to manage care. In an effort to combat this trend and to exercise greater control over the activities of the profession, a number of healthcare professionals have hunkered down to determine critically and comprehensively the sort of care that meets a standard of quality.

As a first step, the Institute of Medicine ("IOM") has embraced a broad definition of quality.[129] It defines quality of care as "the degree to which health services for individuals and populations increase the likelihood of desired health outcomes and are consistent with current professional knowledge."[130] This definition has gained wide acceptance in the formulation of practical approaches to quality assessment in the profession.[131] One reason for its success is its insistence that quality is not a static concept and, rather, is adaptive depending on current professional knowledge and attendant expectations. Within these bounds, defining quality and making it measurable serves dual objectives: health care professionals can judge the effectiveness of their efforts, and patients can know what to expect of the care that they receive. In the end, a workable definition of quality that can be identified and quantified offers the profession the tools to discover and even to raise the standard of health care that communities receive.

What is of particular note in the IOM definition is that it embraces a broader vision of service for the health profession. The IOM deliberately chose the term "health services" as the focus of the

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129. The Institute of Medicine is a private, non-governmental organization associated with the National Academy of Sciences. The IOM mission is to provide objective information and advice concerning health and science policy to the government, the corporate sector, the health profession and the public. *See* Institute of Medicine, *at* http://www.iom.edu/iom/iomhome.nsf/Pages/About+the+IOM (last visited Feb. 6, 2003).

130. *See* Institute of Medicine, Medicare: A Strategy for Quality Assurance 21 (1990), *available at* http://www.nap.edu/books/0309042305/html/ (last visited Feb. 6, 2003).

131. *See* Measuring the Quality of Health Care (Molla S. Donaldson ed., 1999), *available at* http://www.nap.edu/readingroom/books/quality/report.html (last visited Feb. 6, 2003) [hereinafter Donaldson].

content of care.[132] Quality, necessarily then, extends beyond the more narrow boundaries of "medical" services, such that quality becomes a multi-dimensional construct.[133] For example, even the most brilliant medical procedure depends to some extent on health-related services and can be undermined by inadequate follow-up and family resources to continue care after the procedure is completed.[134] Quality must infuse all aspects of service along a continuum of care if it is to have genuine meaning and impact. Moreover, the IOM definition insists that quality address the technical aspects of providing care—health care professionals must keep abreast of professional knowledge.[135] This means, at a minimum, that they must possess the technical proficiency to provide specific services to patients.[136] Furthermore, the IOM model recognizes that the assessment of quality also includes interpersonal features. How well does the health care professional communicate with patients? Is she attentive to her patients' concerns and needs?[137] Finally, the definition contemplates a system by which a quality assessment will incorporate structural measures.[138]

Perhaps what makes the definition most interesting is that which it does not include. It does not advert to, or acknowledge that, resource constraints might hamper quality. Critics have reproached the IOM for this omission. But the IOM appears to have deliberately chosen to avoid mentioning finances, consistent with its view that quality of care should not depend on the patient's wealth to avoid having quality judged on a sliding scale. Quality must incorporate basic elements that inure to the benefit of the patient regardless of funding. Of course, a clear understanding of the availability or lack of funds can prod providers to build in assurances that the health care delivery will not waste resources. But resource availability should be assessed in light of what is expected to be delivered, rather than operating as a frame to restrict that which should be provided.[139]

Still, the IOM definition of quality care took steps not to promise too much. Health care professionals, like other professional service providers, cannot certify that they will deliver a specific outcome, given that each procedure involves uncertainty and risk. But the

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132. *See* Henry T. Ireys et al., *Assuring Quality of Care for Children With Special Needs in Managed Care Organizations: Roles for Pediatricians*, Pediatrics, Aug. 1996, at 178 [hereinafter *Assuring Quality of Care*].

133. *Id.*

134. *See id.* at 5.

135. *See* Paul D. Turner & Louis G. Pol, *Beyond Patient Satisfaction*, 15 Am. Marketing Ass'n J. of Health Care Marketing 45 (1995).

136. *Id.*

137. *Id.*

138. *See* Mark S. Litwin et al., RAND, *Prostate Cancer Patient Outcomes and Choice of Providers: Development of an Infrastructure for Quality Assessment* (2000), *available at* http://www.rand.org/publications/MR/MR1227/Index.html (last visited Feb. 21, 2003).

139. *See* Donaldson, *supra* note 131, at 4.

definition's emphasis on the "desired outcome" suggests that in providing those services, the health care professional must assess the risk and take steps to minimize it. The definition also contemplates that the health care professional will learn what outcomes are desired. This means consulting with patients, including them in the process of understanding the array of potential outcomes, and, then within that range, identifying the outcome that is "desired."

Of course, perspectives on quality can differ and compete. The insurer's or employer's perspective may cause each to measure quality according to the ways in which health care providers spend premium dollars, with particular emphasis on avoiding unnecessary expenditures.[140] Patients evaluate care in terms of its responsiveness to their individual medical needs.[141] Physicians often perceive quality in terms of the outcome of the intervention such that the biological status of the patient has improved.[142] Striking a balance among these competing views and expectations presents an important challenge, but the areas of agreement that emerge may forge the central elements of any definition of quality.

1. Benchmarks of Performance

By design, assessments of care extend beyond the individual encounter between patient and health care professional to include the health plan and the system of care provided to a community.[143] At the individual level, the practitioner must attend to a wide range of patient needs, negotiate clear treatment objectives with the patient, and explain levels of risk and constraints on knowledge.[144] To meet these needs, the practitioner must possess good interpersonal and counseling skills in addition to technical expertise. At the health plan level, the profession must assure that measures are in place to ensure that patients can receive appropriate health care at a level of quality consistent across the program.[145] This does not mean setting and adhering to rigid protocols without the possibility of deviation. Patients rarely fit neatly into proscribed guidelines.[146] The standard of care must maintain sufficient flexibility to allow individual adjustments based on clinical judgment while ensuring such consistency.[147] At the community level, the goal of ensuring quality of

140. Elizabeth A. McGlynn, *Six Challenges in Measuring the Quality of Health Care*, Health Affairs, May-June 1997, at 3.
141. *Id.*
142. *Id.*
143. *See Assuring Quality of Care*, *supra* note 132, at 178.
144. *Id.*
145. *Id.* at 12.
146. *See* R. Heather Palmer, *Process-Based Measures of Quality: The Need for Detailed Clinical Data in Large Health Care Databases*, 1997 Annals Internal Med. 127, 733-38.
147. *See Assuring Quality of Care*, *supra* note 132, at 12.

care involves reviewing the extent to which a community receives appropriate service through its health care delivery systems. Questions regarding accessibility of care, a community's willingness or ability to utilize medical service, and the performance of the health care facilities available to a community factor into the picture of quality at this level.[148]

Benchmarks of performance enable the health care profession to promote quality of care at each of these levels. While outcomes necessarily warrant some attention in defining quality, the principal focus for measuring quality appears to be on process.[149] The underlying justification for such a focus is that best practices will likely improve outcomes.[150] Thus, in determining whether a provider is delivering quality in care, one would observe and measure the provider's interventions. Does she order diagnostic tests? What medical procedures does she perform? What drugs does she prescribe? Are these processes of care widely accepted as positively affecting outcomes?

Above all, the health care profession has come to recognize the importance of establishing benchmarks that represent a measurable and attainable level of excellence.[151] Setting a standard that the profession cannot achieve offers little guidance and encourages providers to substitute their own definitions of adequacy. As importantly, the benchmark of performance should by definition always exceed the level of the average performance, challenging the profession to stretch its performance to attain the goal.[152] In fleshing out the features of the benchmark, all superior performers should contribute, but the benchmark needs to take care that providers with high performance and very low numbers of cases "do not unduly influence benchmark levels."[153] Such performers might be able to perform certain services and provide a level of care that directly relates to their low numbers that would, in the end, skew the benchmark for providers with an average or above average volume of patients.

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148. *Id.*

149. *Concepts Behind the ABC Method*, *in* Center for Outcomes & Effectiveness Research & Education, Univ. of Alabama at Birmingham, *Achievable Benchmarks of Care (ABC) User Manual*, *at* http://main.uab.edu/show.asp?durki=14504 (last visited Feb. 21, 2003) [hereinafter *Concepts of Care*].

150. *See* Palmer, *supra* note 146, at 5 (noting that "outcome-based measures may indicate the need for improvement but do not reveal what is necessary to improve health care. Process-based measures identify specific processes of care that need to be changed and whether specific changes can improve these processes"); *Concepts of Care*, *supra* note 149, at 3

151. *Concepts of Care*, *supra* note 149, at 1.

152. *Id.* at 3.

153. *Id.*

2. Quality Care as Public Message

The choice to set benchmarks for quality care has emerged principally in reaction to a dramatically changing environment. External pressure from insurers, employers and managed care companies to increase effectiveness and lower costs has been instrumental in prodding the medical profession to examine its delivery of quality care.[154] As importantly, a growing sophistication among consumers demanding more effective clinical care and greater accountability for quality has only added to that.[155] These demands have raised the stakes in the marketplace among health care providers to improve service to gain a competitive edge in attracting consumers.[156] Recognizing these changes, pharmaceutical companies and health care providers have begun to target the consumer directly with advertisements touting prescription medications and promises of superior treatment.[157] As a result, patients have been less willing to accept without question that which the medical profession chooses to deliver particularly if the care being offered does not measure up to the patients' raised expectations.[158]

Apart from the changed environment, the move to embrace quality care has developed out of an internal concern: the health profession has wanted to improve the care they give.[159] Managed care has pit the medical profession against professionals who are not necessarily trained in medicine, but who are empowered to make decisions that second-guess prescribed care. This contest has forced some introspection as doctors have found themselves caught in the middle between two opposing poles. On one end, patients demand that doctors provide all that can be imagined, while efforts to control costs press doctors to focus on efficient utilization of their services.[160] What operates as a buffer of sorts is the doctor's own ethical commitment to help her patients.[161] Helping patients may mean being realistic in what doctors offer and promise, but it does not contemplate providing less than quality care to remain within a budget. Given that context, articulating that which constitutes quality care becomes key.

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154. *See generally* McGlynn, *supra* note 140.

155. *See, e.g.*, Barbara Mintzes et al., *Influence of Direct to Consumer Pharmaceutical Advertising & Patients' Requests on Prescribing Decisions: Two Site Cross Sectional Survey*, Brit. Med. J., Feb. 2002, at 278-79, http://www.whp-apsf.ca/en/documents/doc_index.html [hereinafter Mintzes].

156. William M. Sage & Peter J. Hammer, *Competing on Quality of Care: The Need to Develop a Competition Policy for Health Care Markets*, 32 U. Mich. J.L. Reform 1069 (1999).

157. *See* Aparna Kumar, *Doctors Split on Usefulness of Drug Advertising*, L.A. Times, Jan. 14, 2003, at A12; Mintzes, *supra* note 155, at 278-79.

158. *See supra* note 155.

159. *See generally* Donaldson, *supra* note 131.

160. *See* McGlynn, *supra* note 140, at 3.

161. *Id.*

In rescuing the definition of care from others who might define it solely within a cost-control framework, the heath care profession has sent an unmistakable message: Quality is vital. Moreover, quality can be identified, measured and achieved. Embracing a standard of quality in care obviously exerts pressure on the health care profession, but it seems the sort of pressure that the health care profession stands ready to embrace. By promoting quality as a goal in care, doctors can begin to demonstrate that they do not stand in an adversarial position to their patients. Rather, doctors can openly acknowledge that patients are critical partners in identifying that which constitutes quality in health care. The willingness to promote quality and to be held accountable enables doctors to underscore that patients' views matter and that patient care rather than financial constraints should inform the development of standards of care.[162]

Seizing on quality as the standard also helps to set and regulate expectations. The process of developing a benchmark of performance gives guidance for judging an individual caregiver's performance. That benchmark also recognizes and articulates to the public the continuing need for examination and input to ensure that there is no slippage in care. Indeed, measuring the gaps between expectations and experience can help health care professionals as well as the public identify areas for improvement[163] and educate third parties about resource needs to close gaps that might become apparent.

The measurement process makes clear to a broader audience both the factors embedded in quality care and that quality should be a matter of concern to them. A range of methods to determine whether providers actually dispense quality care can be useful. One method involves peer review. This measure contemplates that physicians will review the care that other doctors in their area of practice provide with an eye toward raising the level of care as a whole.[164] This again delivers an important message to doctors that the assessment of quality will be framed by an understanding of what it means to provide medical care. An additional method the health care profession utilizes is patient surveys.[165] Such surveys offer critical feedback to doctors about the ways that patients perceive the care they receive while simultaneously informing patients that they have a right to expect technical expertise in prevention, detection and treatment of illnesses. But patient surveys also notify patients about less technical aspects of their care. The information adduced on such

162. *Id.* at 4.

163. *See* Paul D. Turner & Louis G. Pol, *Beyond Patient Satisfaction*, J. of Health Care Marketing, Fall 1995, at 9.

164. *Id.*

165. *See* Norm Andrzejewski & Rosalinda T. Lagua, *Use of a Customer Satisfaction Survey by Health Care Regulators: A Tool for Quality Management*, Pub. Health Rep., May 15, 1997, at 206, 1997 WL 9736204.

surveys conveys to the patient that the profession intends to track data about the health care professional's courtesy, respect, and clear communications as part of the service that patients receive.[166] Finally, in collecting information about patient health outcomes, the medical profession serves the community by informing them, through the availability of comparative data, of those providers that meet, exceed, or fall below acceptable levels of quality in care.[167]

Obvious differences emerge when one compares the health care profession and indigent criminal defense. But the lessons to be discerned through the health profession's experience are nonetheless instructive. At a minimum, the health care profession has demonstrated the possibility of—and need for—a working definition of quality in the provision of service. The profession has then set standards for measuring and achieving it. Even while acknowledging that quality may be a somewhat amorphous construct, the profession has mapped a procedure for giving it definition that can be used to elevate the level of practice. The next section applies these lessons in the context of indigent criminal defense representation.

B. *Rewriting* Gideon*'s Legacy*

In the ambition to provide effective assistance, indigent defense service providers share the view that a zealous commitment to clients functions as an essential threshold.[168] Clients in the criminal justice system often need help navigating a system that seems foreign to them and all too often operates against them. The tremendously complex responsibility that defenders undertake in representation demands a passionate dedication to a client's goals, a depth of perception about the reactions and biases of a variety of audiences, and unfailing ingenuity in the face of often overwhelming odds. But while quality representation includes attending to the needs of an individual client, it is not confined to that sphere. Given the context in which defenders operate—in the courtroom and in the larger community—defenders need to develop a more expansive definition of quality representation, one that engages defenders in collaborative strategies to increase fairness in the ways that society addresses issues of crime.[169]

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166. *See, e.g.*, Oren Renick et al., *The Searchers II: How Consumers Can Find Cost-Effective, Quality Health Care*, Employee Benefits J., Dec. 1, 2002, at 28 (noting that patient surveys empower consumers at the moment of choice to buy health care), 2002 WL 15846975.

167. *See, e.g.*, Donna O. Farley et al, RAND, Testing CAHPS Health Plan Performance Reports in the Florida Medical Program (2000) (noting that the health plan performance report was designed in part to help consumers compare health plans and to make more informal health care choices), http://www.rand.org/publications/MR/MR1218 (last visited Feb. 21, 2003).

168. *See generally* Ogletree, *Beyond Justifications*, *supra* note 120.

169. *See generally* Taylor-Thompson, *Alternating Visions*, *supra* note 9.

Such a definition of quality might appear to incorporate more dimensions than would initially seem necessary or prudent. Fears about the potential misuse of new and broader standards should not be underestimated. Defenders have experienced, with troubling frequency, the wrath of both funding authorities and the public for engaging in the work that the Constitution compels.[170] Giving critics an additional tool—or handy excuse—to scrutinize the work of defenders makes most defenders and their offices understandably nervous. Nevertheless, defenders stand to gain from such a definition of quality. The defense bar rails against its members who purport to represent clients, but more often function as "walking violations of the sixth amendment."[171] Defenders should take the creation of this definition as an opportunity to be imaginative, rather than cautious, in identifying the attributes of their role. Defining their own standard of quality enables indigent defense service providers to prove that which they profess and fundamentally believe: that an indigent accused can receive quality representation even though she does not pay for the service she receives.

With that goal in mind, any definition of the role of counsel should unashamedly embrace quality. Borrowing from the IOM definition, one might choose to define quality in representation as "the degree to which legal assistance, consistent with professional knowledge, safeguards the interests of the individual accused and increases the likelihood of fairness in the criminal justice system."[172] This proposed definition invites analysis in three different arenas. First, what constitutes quality in individual representation? Second, what is necessary to drive quality through an office? And third, what steps assure quality for a community in addressing issues of fairness in the criminal justice system as a whole? By thinking about quality in individual and systemic terms, defenders can begin to give the role of counsel the meaning that it has lacked.

Both an individual and the systemic focus are crucial. Being an effective advocate for an individual charged with a criminal offense contemplates a commitment and zeal that motivates the defender to demand excellence of herself.[173] Many defenders, however, have

170. *Id.* at 24, 31. For example, defender budgets have suffered severe cuts largely because the public perceives defenders as contributing to the crime problem by representing the accused. *See* Rebecca Marcus, *Racism in Our Courts: The Underfunding of Public Defenders and its Impact Upon Racial Minorities*, 22 Hastings Const. L. Q. 219, 224 (1994).

171. David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. Cin. L. Rev. 1, 2 (1973) (reporting the development of the phrase "walking violation of the sixth amendment" by trial judges trying to capture the ineffective assistance that had become a common phenomenon).

172. The quoted material is the definition of quality in representation advocated by this article.

173. *See* Ogletree, *Beyond Justifications*, *supra* note 120, at 1246-47.

come to recognize the limitations of individual representation in effecting lasting change in the justice system.[174] Strategies that once successfully advanced clients' goals have become less effective in today's environment. Motions to suppress evidence too often become little more than opportunities to learn more about the government's case rather than serving as chances for courts to step in to redress a violation. The legal landscape has become less alert to—and more tolerant of—abuses that occur in interactions between individuals and police.[175] The political environment rewards politicians who endorse tougher criminal sanction regardless of their ultimate effectiveness.[176] The social setting fuels a mounting fear of crime that orients some jurors towards conviction in a desperate effort to strike a blow against crime.[177] Even as defenders bring ingenuity and passion to the fight inside the courtroom, confining their advocacy to that arena may, in the end, disserve the very clients they seek to help.

In response to these circumstances, defenders have begun to address the broader needs of both individual clients and the communities from which their clients come.[178] While *Gideon* may have made clear that the right to representation extended to state proceedings, the practice of implementing that ruling and providing substance to the idea of zealous defense advocacy has evolved since then. Defenders no longer define quality representation solely by what happens within the confines of the courthouse. Rather, the defender's advocacy role extends outside of the courtroom and into the communities in which their clients reside.[179] Defenders are working toward changing justice policies that threaten individual liberties, all without sacrificing the effective representation of clients in individual criminal cases.[180] This expanded definition of the defender's role not only brings inherent challenges and risks, but it

174. *See, e.g.*, Terry Brooks & Shubhangi Deoras, *New Frontiers in Public Defense*, 17 Crim. Just. 51 (2002); Brennan Center for Justice, N.Y.U. School of Law, *Taking Public Defense to the Streets*, http://www.brennancenter.org/resources/cji_series/article_1.pdf (last visited Feb. 21, 2003) [hereinafter *Taking Public Defense to the Streets*].

175. *See, e.g.*, Whren v. United States, 517 U.S. 806, 813 (1996) (noting that the "actual motivations of individual officers" are irrelevant to a Fourth Amendment analysis of the validity of a search and seizure); United States v. Leon, 468 U.S. 897, 913 (1984) (establishing good-faith exception to Fourth Amendment exclusionary rule).

176. *See generally* Clarke, *Problem-Solving Defenders*, *supra* note 113.

177. *See, e.g.*, Benjamin Steiner, *Folk Knowledge as Legal Action: Death Penalty Judgments and the Tenant of Early Release in a Culture of Mistrust and Punitiveness*, 33 L. & Soc. Rev. 461, 464-65 (1999) (noting that an uneasiness about crime provides a rationale to the public for harsh punishment).

178. *See generally "The Best Defense Is No Offense," supra* note 126 (advocating that defender offices seek ways to make clear that they are committed to reducing crime in communities).

179. *See Taking Public Defense to the Streets*, *supra* note 174, at 1, 7-10.

180. *Id.* at 7; Clarke, *Problem-Solving Defenders*, *supra* note 113, at 407.

also cries out for the development of tools to measure whether defenders are achieving quality in these new areas.

Defenders might begin by formulating their own benchmarks. A number of defender offices are widely recognized as providing comprehensive and quality service to clients.[181] Institutional defenders such as the Public Defender Service of the District of Columbia and the Defender Association of Seattle have earned reputations within the defense community for innovative and client-centered representation.[182] Similarly, relatively newer and smaller community-based programs like the Neighborhood Defender Service of Harlem and The Bronx Defenders have taken traditional approaches and expanded them to include practices that are community-informed and community-sensitive.[183] One recently reorganized office, Knoxville Tennessee Community Law Office, has pushed the boundaries further in creating a one stop-shopping model of representation for the indigent accused, enabling clients to address a wide range of criminal and civil legal needs in one setting.[184] Gleaning practices from these offices may offer a starting point in formulating benchmarks of quality practice that defenders as a whole would want to emulate.

1. Benchmarks in Individual Representation

In developing a framework for considering the key elements of quality in individual representation, defenders might pose a series of normative questions to focus their efforts. For example, defenders would need to examine that which they would consider the representational role of lawyers assigned to provide assistance to clients charged with crimes. What is the objective of each representation and who should be involved in that decision? What should the standards for quality performance be? What are the essential skill and knowledge sets that enable defenders to fulfill the representational mission? How is the success of a representation determined and by whom? Using these questions as a guide, the defenders could then examine the practices of the leading offices in formulating standards of performance.

In determining the objective of the representation, defenders in those offices that have gained national reputations for the quality of their service work together with their clients to define the problem to

181. *See* Clarke, *Problem-Solving Defenders*, *supra* note 113, at 448-54 (noting the success of the public defender offices in Harlem, the Bronx and Washington, D.C.).

182. *Id.*

183. *See* The Bronx Defenders, *at* http://www.bronxdefenders.org (last visited Feb. 21, 2003); Neighborhood Defender Service of Harlem, *at* http://www.ndsny.org (last visited Feb. 21, 2003).

184. *See* Knox County Public Defender Community Law Office, *at* http://www.pdknox.org/800main.htm (last visited Feb. 21, 2003).

be addressed and to identify the objectives and strategies to achieve those objectives.[185] The lawyer's role by design is client-centered.[186] The relationship does not operate in a top-down fashion in which the defender determines and then dictates the approach to address the client's problem. Instead, the relationship is collaborative. Both the client and the defender bring overlapping, valuable information and skills to the encounter that should inform the plan of action in the lawyer-client relationship.[187] Developing a relationship of trust and open communication means maximizing contact and sharing information related to the case and the client's concerns. This relationship also contemplates recognizing and appreciating cultural differences that may permeate and affect the rapport between the lawyer and the client.[188] Ultimately, this working collaboration envisions that the client will play a critical role not just in deciding whether to plead guilty, to proceed to trial or to testify, but in every aspect of the case as it proceeds.

The standards for quality performance in a legal proceeding appear to involve factors that enhance the lawyer's ability to advocate fiercely on behalf of her client. For example, to handle and prepare for the complexities of a criminal proceeding, these defender offices have come to regard early intervention[189] in cases and vertical representation[190] as fundamental requirements. Early entry into a case allows the defender to become better informed about the facts of the client's legal case and to track investigative leads that with the

185. *See generally* Clarke, *Problem-Solving Defenders*, *supra* note 113, at 448-57.

186. *See* Ogletree, *Beyond Justifications*, *supra* note 120; Deborah L. Rhode, *Ethical Perspectives in Legal Practice*, 37 Stan. L. Rev. 589, 605 (1985) (noting that in criminal defense, the "case for undiluted partisanship is most compelling"); Abbe Smith, *"Nice Work If You Can Get It": "Ethical" Jury Selection in Criminal Defense*, 67 Fordham L. Rev. 523, 529-30 (1998).

187. *See* Gerald P. López, *The Work We Know So Little About*, 42 Stan. L. Rev. 1, 9 (1989).

188. *See generally* Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 Clinical L. Rev. 33 (2001).

189. The Neighborhood Defender Service of Harlem has a 24 hour call-in line to permit clients to gain access to a lawyer. The Public Defender Service for the District of Columbia has a "duty day" lawyer—a lawyer available to the public on a daily basis to answer questions and to assist individuals who have information that they may be wanted by the police. In those instances, the duty day lawyer will accompany an accused to the police station for a voluntary surrender and will endeavor to protect the accused by making clear in the booking process that her client asserts her right to silence.

190. Vertical representation requires the assignment of a lawyer to each individual client at the arrest stage such that the defender maintains responsibility for the case from start to finish. *See* Janet A. Gilboy & John R. Schmidt, *Replacing Lawyers: A Case Study of the Sequential Representation of Criminal Defendants*, 70 J. Crim. L. & Criminology 1, 13 (1979); Taylor-Thompson, *Alternating Visions*, *supra* note 9, at 2428. Some offices, such as the Neighborhood Defender Service of Harlem, have added a team component to the vertical representation model with lawyer and non-lawyer team members providing services to the client throughout the representation.

passage of time would likely become less productive. Vertical representation permits a continuity of contact between the client and her lawyer that can build client confidence and can enable the relationship to evolve over time.

If the client elects to proceed to trial, the practice within these offices suggests an organizational structure that provides technical support for the lawyer's advocacy in defense of her client.[191] This means that she must conduct an investigation of the underlying facts that exceeds a perfunctory examination of witness statements and police reports. Given the press of cases, defenders typically work collaboratively with staff investigators assigning them the responsibility of interviewing government witnesses and locating defense witnesses. At a minimum, the defender's role at trial contemplates confronting adverse witnesses, rather than sitting mute because she lacks the necessary information to develop lines of cross that come from a full understanding of the witnesses' claims and potential areas of bias.

The goal of providing quality assistance demands technical proficiency commensurate with the complexity of the case. The lawyer must understand how to develop a theory of the case that creates an imperative to acquit. She must understand the methods by which she can raise and create doubt in the minds of the factfinders. To perform her role effectively, the defender must have a working knowledge of the governing law and precedents such that she can raise evidentiary issues and formulate appropriate objections and requests for limiting instructions. As importantly, the defender must understand the spoken and unspoken biases in the room so that she can challenge presumptions that may operate against her client. Every case brings unique facts and issues that demand both the defender's creativity and fresh look. Once the defender succumbs to the view that cases are fungible—that a particular case is "just another drug case"—then she has begun an all too dangerous descent below an acceptable standard of performance.

While the defender's trial expertise is vital, it is only a portion of the requisite advocacy skills. She will need sufficient expertise and knowledge to evaluate and negotiate a case. Being able to appreciate the strength and weaknesses of the government's case assists the lawyer in gaining sufficient leverage to negotiate on behalf of her client. Given the potential of collateral consequences flowing from any decision to negotiate a case, lawyers, at a minimum, must maintain a working knowledge of the potential sentencing consequences of any negotiated settlement of the charges.[192] Her

191. *See generally* Ogletree, *Beyond Justifications*, *supra* note 120, at 1287 (describing the divisions supporting trial work at the Public Defender Service for the District of Columbia).

192. *See generally* Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance*

negotiation skills must be buttressed by excellent communication skills that not only permit her to explain complex concepts clearly and persuasively, but also allow her to communicate across lines of difference. Economic and racial differences between the lawyer and the client can often operate as a barrier to relationships of trust unless the lawyer develops the sort of sensitivity that allows her to see issues from perspectives other than her own.[193]

Effective advocacy at sentencing draws equally on specialized skills. Too often, lawyers fail to recognize that the sentencing stage demands creative and aggressive advocacy. With the advent of sentencing guidelines and mandatory sentencing schemes, the range within which a judge can maneuver may be limited.[194] This reality often lures lawyers into the mistaken belief that little can be done to affect the outcome. But the better offices recognize that sentencing remains a critical stage in the proceedings and demands attention and creative passion. The legislatively imposed limitations on the judge's discretion may place a greater emphasis on the negotiation stage to place the client in an acceptable sentencing range. Or, if the sentencing scheme permits judges to depart from guideline constraints, the defense lawyer will need to provide sufficient background information about her client to justify the departure.[195] In those jurisdictions where the judge's or jury's sentencing discretion is not so strictly limited,[196] the defender will need to present the sort of mitigating evidence or factual information that encourages the court to see the client as more than just a personification of her charges.

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of Counsel & the Consequences of Guilty Pleas, 87 Cornell L. Rev. 697 (2002); Lea McDermid, Comment, *Deportation Is Different: Noncitizens and Ineffective Assistance of Counsel*, 89 Cal. L. Rev. 741 (2001); Daniel J. Murphy, *Guilty Pleas and the Hidden Minefield of Immigration Consequences for Alien Defendants: Achieving a "Just Result" by Adjusting Maine's Rule 11 Procedure*, 54 Me. L. Rev. 157 (2002).

193. *See generally* López, *An Aversion to Clients*, *supra* note 115, at 315 (reminding an audience of progressive white lawyers that their work mandates that they push themselves beyond the comfort of talking to other like-minded lawyers and instead to collaborate with clients of color and their communities, to solicit their views, and to reconceptualize goals in light of those views).

194. *See* Bennett L. Gershman, *The New Prosecutors*, 53 U. Pitt. L. Rev. 393 (1992) (suggesting that prosecutors exercise power over sentencing that was previously the domain of sentencing judges); Joseph S. Hall, *Guided to Injustice?: The Effect of the Sentencing Guidelines on Indigent Defendants and Public Defense*, 36 Am. Crim. L. Rev. 1331, 1341 (1999) [hereinafter Hall, *Guided to Injustice?*] (noting that due to loss of judicial discretion, sentencing in the federal courts has become formulaic).

195. *See* Hall, *Guided to Injustice?*, *supra* note 194, at 1348 (noting changes in the factors that federal judges can consider in granting a downward departure).

196. While some states have adopted sentencing guidelines, most still give judges considerable discretion in sentencing. *See generally* Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 Fordham L. Rev. 13, 23-24 (noting that most state judges retain some sentencing power); Kay A. Knapp & Denis J. Hauptly, *State and Federal Sentencing Guidelines: Apples and Oranges*, 25 U.C. Davis L. Rev. 679 (1992) (discussing differences in impact in federal and state sentencing guidelines).

Such advocacy necessarily begins with the defense lawyer's relationship with her client. If she cannot see her client beyond the charge that brings her to the office, then she will likely fail in any effort to persuade others to treat her client differently. As a baseline, the commitment that the defender brings to the relationship must involve a passionate dedication to the goal of advancing the client's interests within the bounds of the law. As importantly, the defender must develop the ability to listen and work collaboratively with her client. Moreover, she must resist the temptation to presume that because of her educational advantages, she will know what is best for her client. Given that the accused and defender may come from different racial and socio-economic backgrounds,[197] a willingness to consider matters from a perspective that may differ from her own is key. Even when the defender and accused share a racial heritage, differences in perspective may emerge that make listening and collaborating all the more important in the relationship. Above all, treating clients with respect and dignity seems fundamental in a process that at times seems characterized by the indignities to which it subjects many of its participants.

Of course, the best defender offices take these skills and obligations as a given.[198] What sets these offices apart from the rest is that they routinely required reorienting their approach to public defense away from a singular concentration on the life of a case toward a broader focus on the life of the client. Although the criminal charge is the likely catalyst that initiated the lawyer-client relationship, that charge is often only the tip of the iceberg. Once the defender acknowledges that the client is considerably more than the case that brought her through the door, then the defender must take steps to understand the life of that client in much greater detail. Although this approach to lawyering has recently gained a name—holistic or whole client advocacy—[199] defender offices like the Public Defender Service and The Defender Association of Seattle have been engaged in this practice for at least the past thirty years.[200]

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197. López, *Aversion to Clients*, *supra* note 115, at 316.

198. *See generally* Ogletree, *Beyond Justifications*, *supra* note 120, at 1286-87 (describing how the Public Defender Service limits caseloads to enable lawyers to have the time to attend to clients and to become involved in understanding their life circumstances).

199. *See* Clarke, *Problem Solving Defenders*, *supra* note 113, at 429.

200. Since its inception in 1970, the Public Defender Service for the District of Columbia maintained an Offender Rehabilitation Division that focused on providing support services to the client as she proceeded through the criminal justice system. *See* The Public Defender Service for the District of Columbia, *at* http://www.pdsdc.org (last visited Feb. 21, 2003). The Defender Association of Seattle, initially organized in 1969 as a Model Cities Program, helped to form TeamChild, which provides comprehensive services to juvenile offenders in an effort to keep them out of the juvenile justice system. *See* The Defender Association, *at* http://www.defender.org/resume.html (last visited Feb. 21, 2003); TeamChild, TeamChild Overview, *at*

At a minimum, holistic advocacy means working with the client to find ways to prevent future involvement with the criminal justice system as well as working to disentangle her from her current criminal charge. Doing both effectively requires sensitivity to the racial and economic dynamics at play in a client's experience that may help to explain her involvement in the criminal justice system. It also mandates collaboration with other professionals—social workers, job counselors, housing advocates and the like—in helping the client advance a goal of noninvolvement in the system. Without working to understand her clients' lives and life circumstances, the defender cannot begin to understand how her professional intervention may affect her clients' experiences with the system of justice and larger community. This larger role, therefore, presupposes developing a broader standard of performance against which to measure whether the strategies defenders employ have a chance of meaningful change in the clients' circumstances.[201]

Why would defenders want to assume a level of performance that places demands on them that extend beyond the actual confines of a legal proceeding? The answer appears to be that defenders have begun to see the benefits of such full-service lawyering.[202] In the context of the technical legal role that defenders play, developing an understanding of the community from which the client comes may give the defender critical insights into that client's options and challenges, support systems, and obstacles to success. More particularly, a deeper appreciation of the environment that may have contributed to a client's conduct can help defenders explain their client's actions. On a more basic level, the process of treating one's client with respect and dignity, taking the time to ascertain the client's needs, and working in conjunction with the client to address them aids the defender's relationship with her client. With that degree of commitment to the client, the client herself can feel better about the assignment of counsel in which she typically exercised no choice and can begin to develop confidence that her lawyer will work on her behalf against a state that does not have her interests at heart.

This enhanced notion of representation raises important questions about when the representation ends.[203] The conventional formulation of the lawyer-client relationship suggests that representation terminates upon acquittal at trial or upon sentencing. The legal

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http://www.teamchild.org/overview.html (last visited Feb. 21, 2003).

201. *See* López, *Aversion to Clients*, *supra* note 115, at 316.

202. *See Taking Public Defense to the Streets*, *supra* note 174, at 6 (noting that in surveys sent to over 900 defenders across the country, over half indicated that they were currently engaged in collaborative efforts with community residents, groups or activists in their jurisdiction).

203. *See generally* Anthony C. Thompson, Address to the NLADA Annual Conference (Nov. 14, 2002), *at* http://www.nlada.org/DMS/Documents/1038340494.03/Anthony%20Thompson%20Re-entry%20speech.doc (last visited Feb. 21, 2003).

proceeding has reached a technical conclusion and the case can be closed. Even within this framework, however, the suggestion that the representation has ended may be an overstatement. The incarcerated client may continue to encounter issues, strictly related to the case, that her defender will need to address. For example, when a client has cases in multiple states or in state and federal court, corrections officials often issue detainers to indicate a future hold on the client. At times, these detainers operate in ways that thwart the court's sentencing intent.[204] Thus, the lawyer would need to correct this situation because, without the lawyer's intervention, the client is often left without any other assistance.

Under the broader formulation of the defender's role that involves whole client advocacy, the defender and other service providers in the defender office, by design, may continue to work with the client after the formal criminal proceeding has terminated. Many defender offices are beginning to extend their representation to issues facing their clients as they re-enter their communities upon release from a period of incarceration.[205] This responsibility contemplates working with other professionals as well as their clients to address problems that uniquely confront ex-offenders as they struggle to reintegrate into communities. Such advocacy significantly lengthens the period of representation and requires thought about standards of performance as well.

2. Quality as the System's Goal

However one maps the boundaries of representation, the system of delivery must also embrace quality. Quality representation obviously depends on the individual lawyer's skill and commitment. But an important condition in providing quality representation is that the

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204. Take, for example, a situation where an individual is sentenced on independent cases in federal and state court. Assume further that the lawyers in each case have convinced the sentencing judges to allow the client to serve her sentences concurrently. If she is in state custody at the time of the federal sentencing, the federal sentence will not commence upon imposition of the sentence. It will instead operate as a detainer which will mean that she will serve consecutive sentences unless a lawyer intervenes to correct the process.

205. For example, the Community Defender Office of the Public Defender Service for the District of Columbia sets as an ambition responding to "legal and social service needs of newly released parolees and assist[ing] them in making a successful transition back into the community." *See* The Public Defender Service for the District of Columbia,, The Community Defender Program, *at* http://www.pdsdc.org/CommunityDefender/index.asp (last visited Feb. 21, 2003) [hereinafter Public Defender – DC]. The Dade County Public Defender Office has established a comprehensive Anti-Violence Initiative. A component of this initiative involves entering into partnerships with local government agencies to "improve former clients' ability to obtain employment." *See* Miami-Dade Public Defender's Office, Public Defender AVI Primary Community Partnerships, *at* http://www.pdmiami.com/partnerships.htm (last visited Feb. 21, 2003).

office or delivery system seek to promote quality to enable the individual lawyer to perform as she should. To ensure quality in representation, defenders will need first to determine what is necessary to drive quality through an indigent defense delivery system. To do this, defenders might decide to undertake defining an indigent defense system's mission and, as a prerequisite, helping to determine who should be involved in defining it. To do this, defenders would need to consider what the essential conditions necessary to fulfilling that mission are and how to measure whether the steps taken are successful and whether systemic conditions promote quality representation.

When the Executive Session participants examined the mission of indigent defense service providers, they defined the mission as twofold.[206] They envisioned that a system would embrace and promote holistic advocacy for individual clients. Additionally, they identified a larger mission for the system of public defense that involved ensuring that the voices of those against whom policies are typically implemented have a place in the system of justice. In performing this role, they saw the mission of the public defense system as safeguarding against any efforts by the government to sacrifice fairness at the altar of security. Defenders, in their judgment, needed to assume a more public role in reminding government and the public that our freedoms constitute our security.[207]

This greater function for the defender system melds a variety of roles. First, the system assumes a public education role. This envisions that defenders will leverage the media with consistent messages about fairness. Defenders need to recognize and articulate the myriad ways that the interests of the accused converge with those of the general public. All the while, defenders must stress the importance of the defense function by telling the story that the courts and policy makers have barely mentioned. Second, the public defense system should play a political role. Events that occur in the criminal justice system are highly influenced and charged by politics. To provide some measure of balance, defenders can no longer cede control of the agenda to prosecutors, police and other political leaders. They must take an active part in setting the criminal justice agenda. This means anticipating policy trends, monitoring legislation to correct missteps, and proposing alternatives that maintain a central focus on fairness. Third, the public defense system should play a critical role in the communities from which clients come and to which

206. *See, e.g.*, Robin Steinberg & David Feige, *Cultural Revolution: Transforming the Public Defender's Office* (August 2002), *at* http://www.ksg.harvard.edu/criminal justice/executive_sessions/espd.htm (last visited Feb. 6, 2003) [hereinafter Steinberg & Feige, *Cultural Revolution*].

207. *See generally* Clarke & Stone, *Bolder Management*, *supra* note 124; *"The Best Defense Is No Offense," supra* note 126.

they will return. Defenders must seek out ways to work collaboratively with the communities that too often lack a voice in how the system of justice operates.

The prerequisites for fulfilling both the individual representation mission and the larger public role coincide. Let's consider them one at a time. First, the defense bar and defense delivery systems cannot operate effectively without sufficient independence from the judicial and executive branches. Defense lawyers must be free from interference in the exercise of their representation. This does not mean that defense systems should be allowed to operate without oversight given fiscal accountability concerns. But it does mean that restrictions on the role of counsel can interfere with a defender's ability to provide zealous representation and can compromise quality. Such restrictions can include judicial interference with or political intrusion into the lawyer-client relationship. For example, if judges feel political pressure to control costs, they may look to limit or refuse to approve expenditures for expert services requested by the defense.[208] Additionally, electoral considerations can improperly influence the judge's decision to appoint or reappoint a chief defender.[209] If a governor runs for election on a tough on crime platform, she may feel compelled to appoint a chief defender who is less than zealous in her efforts to defend the very people the governor seeks to remove from society.[210] Independence from such influence enables the defender to have sufficient sense of mission and provides safeguards that enable her to deliver effective assistance.

A second precondition for quality is that the system receive adequate funding to handle both the number and complexity of cases assigned to the defender or defender system. Underfunding of the defense function has become so commonplace that its mere mention borders on the obvious.[211] But the impact is clear. A lack of sufficient resources strains the system in ways that may not always be apparent. Inadequate funding forces the defender to make assessments about the ways in which she will spend limited funds and may lead them to cut corners in the conduct of the defense to stay within budgetary constraints. Such choices will inevitably affect the quality of the representation. A defender office operating under an inadequate budget may be unable to fill staff vacancies or to hire sufficient numbers of lawyers.

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208. *See, e.g.*, Catherine Greene Burnett et al., *In Pursuit of Independent, Qualified, and Effective Counsel: The Past and Future of Indigent Criminal Defense in Texas*, 42 S. Tex. L. Rev. 595, 639 (2001).

209. *Id.* at 646; Stephen B. Bright, *Glimpses at a Dream Yet to Be Realized*, Champion, Mar. 1998, at 12, 65 [hereinafter Bright, *Glimpses*].

210. Bright, *Glimpses*, *supra* note 209, at 65.

211. *See id.*, at 66; Klein & Spangenberg, *supra* note 104, at 1 (prepared for the American Bar Association Section of Criminal Justice Ad Hoc Committee on Indigent Defense Crisis).

Third, caps on caseloads or standards that govern the number of cases an individual can handle at a given time will directly affect the nature and quality of the representation provided.[212] If a defense delivery system does not at once identify and impose limits on the number of cases for which an individual lawyer will be responsible, case pressures will inevitably overwhelm the lawyer and compromise the representation. A lawyer working in a defender office crippled by case overload candidly reported that prior to the increase in cases in her office, she had conceived of her role as looking for the single issue that would give her client a plausible argument to make in her defense. With case overload, that same lawyer now looked for the one issue that she could identify to convince her client to resolve the case short of trial.[213]

Fourth, the appointment system must be governed by set standards of assignment that focus on competence to perform the function of defense counsel. Obviously, the appointing authority may have competing concerns in administering an indigent defense system. For example, there may be pressures to move cases efficiently and quickly. But the speed with which a lawyer resolves a case should never form the basis for appointment. Clearing a court's calendar may be an important goal, but the choice of counsel should be a separate objective.[214] Similarly, an appointing authority should not be permitted to pretend that a system that rewards the appointment of a case to the lowest bidder will do anything other than guarantee mediocrity or worse. Standards that focus on the lawyer's qualifications to handle a case of a particular level of seriousness as well as her ability to work well with clients should be factors that assume the highest significance in the appointment process.[215]

A fifth condition is perhaps more controversial but nonetheless vital. Quality cannot be achieved in representation in the criminal justice system without a working familiarity with the concerns of the communities in which defender offices operate and from which their clients come. By maintaining an active presence in communities,

212. *See* Nat'l Legal Aid & Defender Ass'n, The Other Face of Justice 29 (1973); Comment, *Caseload Ceilings on Indigent Defense Systems to Ensure Effective Assistance of Counsel*, 43 U. Cin. L. Rev. 185 (1974) (recommending maximum caseloads per year for individual public defenders).

213. Between 1988 and 1990, I served as a consultant examining indigent defense in Georgia, Minnesota and Wisconsin. These comments were made in the course of an interview of a staff lawyer.

214. *See, e.g.*, Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges Is Indispensable to Protecting Constitutional Rights*, 78 Tex. L. Rev. 1805, 1812 (2000) [hereinafter Bright, *Elected Judges*] (noting the continual appointment of Joe Frank Cannon, who, by his own account, sped through capital trials like "greased lightning").

215. *See, e.g.*, NLADA Standards for the Administration of Assigned Counsel Systems (1989), *available at* http://www.nlada.org/Defender/Defender_Standards/Standards_For_The_Administration_Of_Assigned_Counsel (last visited Feb. 6, 2003).

defenders increase their ability to tap into residents' experiences with the criminal justice system. This interaction can expose defenders to reasons that members of subordinated communities may find law and lawyers more dangerous than helpful. It offers firsthand knowledge of the impact of criminal justice policies and how those policies may be perceived by the individuals in whose names these actions are often initiated. Having this information can help the defender remain alert both to trends in criminal justice and to hot-button issues that may ultimately affect her clients' rights and lives.

A final condition that will help to promote and guarantee quality is comprehensive training. Too few defender offices and indigent defense systems provide on-going training to prepare defenders for the task of representing a client well.[216] The Public Defender Service for the District of Columbia ("PDS") has set the model that has served its lawyers and clients for the past forty years.[217] The program conducts an initial six week in-house training regimen for entering lawyers before they represent a single client.[218] The training is designed to help defenders think about the various facets of representation and to engage in simulations that highlight aspects of the representation to help identify best practices and correct missteps before a client's liberty is at risk. PDS also sponsors the Criminal Practice Institute ("CPI"), an annual training program for the entire defense bar that includes social workers, investigators and other professionals in the role of trainers.[219] The CPI also produces a trial manual to aid lawyers in practice.[220] Such programs help to lift the level of performance in representation.

But training should not confine its focus to the dynamics of individual representation. If the indigent defense community intends to embrace a larger role in the community, then the training regimen needs to help individual defenders understand the dynamics of collaborative work in the broader community.[221] In many ways, the training for community collaborations might feel unfamiliar and almost counterintuitive to the individual lawyer. Representing individuals in the course of a criminal proceeding places the lawyer in a position of significant control over the way the case will proceed.

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216. *See generally* Charles J. Ogletree, *An Essay on the New Public Defender for the 21st Century*, 58 Law & Contemp. Probs. 81 (Winter 1995).

217. *See* Public Defender – D.C., *supra* note 205.

218. *See* Ogletree, *Beyond Justifications*, *supra* note 120, at 1286.

219. *See* The Public Defender Service for the District of Columbia, The Criminal Practice Institute (CPI), at http://www.pdsdc.org/cpi/index.asp (last visited Feb. 21, 2003).

220. *Id.*

221. *See* Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 Notre Dame L. Rev. 321 (2002) [hereinafter Thompson, *It Takes a Community*] (discussing the need for training for prosecutors interested in pursuing community prosecution objectives).

This is not meant to suggest that the lawyer dictates the course of action or does not work closely with her client. But in the hearings as well as in trial, the lawyer has considerable flexibility in mounting the defense and determining how to present the client's case. In collaborative work that may involve a number of individuals and entities, the degree of control a single individual can wield—or, more importantly, maintain—may be much less than that which the individual lawyer has come to expect.

Training for collaborative work involves helping to prepare lawyers to subordinate their views to competing interests in attaining the desired outcome. Helping lawyers to discern when they can reasonably yield and when they must remain firm will be an important part of training. In addition, training should underscore the value of assuming a facilitative as opposed to a central role. Above all, lawyers will need to learn ways to become involved in a community so that they can begin to understand in some depth the degree to which the lives of their clients and the concerns of the larger community intersect and overlap.[222]

Establishing a mission and identifying the necessary conditions for quality offer an important start, but without identifying how that quality can be measured, the defender community will ultimately engage in a process that may offer more flash than substance. The indigent defense community may wish to consider benchmarks and standards as a means of establishing the level of quality the defense should attempt to achieve. It may then choose to identify the process by which defense lawyers' performance should be reviewed. One option may be to utilize survey instruments coupled with some form of peer review.

One target of such a survey should be the clients whom defense counsel serve. Defenders often discuss client surveys as a potentially fruitful source of information about the lawyer-client relationship.[223] Unfortunately, defender offices rarely conduct them. A host of reasons may explain this phenomenon. Principal among them may be that defenders may lack the technical expertise involved in developing survey instruments or in determining how to contact clients to gather such information. Groups that rely on survey tools note that gathering information requires considerable follow-up.[224] Such efforts may make comprehensive surveys virtually impossible given the demands on defenders' time. But defenders could consider developing partnerships with graduate schools or law schools such that students might undertake the implementation of the study.

222. Kim Taylor-Thompson, *The Politics of Common Ground*, 111 Harv. L. Rev. 1306 (1998); *see also* Regina Austin, *"The Black Community," Its Lawbreakers, and a Politics of Identification*, 65 S. Cal. L. Rev. 1769 (1992).

223. *See generally* Steinberg & Feige, *Cultural Revolution*, *supra* note 206.

224. *Id.*

Should a surveying procedure prove to be unreasonable, less ambitious efforts to solicit the views of focus groups of clients may still be possible.[225] Ultimately, clients offer a critical perspective because they are the recipients of the representation and their perspectives should contribute to any definition of quality.

Some defense lawyers have raised the concern that surveying clients who are now incarcerated will necessarily result in a bad review of the lawyer's performance.[226] Obviously, the outcome of the case, particularly if it involves a lengthy sentence, has the potential of skewing clients' assessment of the lawyer's conduct. Defense lawyers may need to factor in this possibility as part of the survey tool. However, anecdotal information suggests that even when the outcome of a case involves a prison term, clients can say—and do indicate—that their lawyer performed well and provided quality service.[227] Particularly in cases where the lawyer has treated the client with respect and worked hard for the client, clients note that the working relationship measured up to their expectations. Indeed, clients are often quite savvy about what their chances were and appreciate the effort expended on their behalf. Ignoring vital information, such as a client's perception, is a mistake for a defender.

Given a broader collaborative role for defense counsel, defenders may want to devise an instrument to seek and gather feedback from community residents. This feedback can occur through the use of a survey tool or through regular meetings with residents, possibly through an advisory board to solicit the community's perceptions of the work of the defenders and the defender office.[228] The sort of information that defenders might attempt to gather from community residents might include the community's views on the extent to which it considers the defender office part of the dialogue on crime and as contributing to the effort to maintain fairness in the system. Defenders may anticipate receiving information from the community suggesting that they not perform their role effectively, but recent group polling conducted by the National Legal Aid and Defender

225. *Id.*

226. In my capacity as consultant to the Defender Division of the Administrative Office of the U.S. Courts, I spoke with both federal and state defenders from across the country who expressed this concern.

227. From 1981 to 1991, I worked as a public defender with the District of Columbia's Public Defender Service. As I assumed supervisory positions, I was in the position to learn of and evaluate any complaints, including those lodged against lawyers. During that time, it was not unusual to hear laudatory comments from clients about their lawyers, even when they were serving long sentences, and complaints tended not to relate to sentences received.

228. *See* Thompson, *It Takes a Community*, *supra* note 221, at 368 (discussing the use of community advisory boards to give feedback to a prosecutor's office); Neighborhood Defender Service, Program Plan for the Neighborhood Defender Service (May 2, 1990) (on file with Fordham Law Review).

Association ("NLADA") does not support this assumption.[229] Their polling data reveals that the public generally believes in an individual's right to have effective representation.[230]

Defenders might also survey other members of the bar to solicit impressions of their work. An open dialogue between the indigent defense bar and the larger local or state bar has often led to collaborative efforts that have improved the system of defense.[231] A past president of the ABA noted the connection between quality and efforts by the bar. He noted,

> In the absence of a concerted effort by the bar and other interested groups, the quality of indigent defense will continue to deteriorate.... State and local bar associations also have a responsibility to act when, due to lack of adequate and balanced funding, the constitutional rights of indigent persons accused of crimes are consistently violated. I encourage state and local bars to support increased funding for indigent defense, and to educate legislators that their policies have consequences for the entire justice system.[232]

The mutual flow of information about practices and limitations may help to raise the consciousness of the bar and ultimately the public about that which should be provided to defense systems to permit them to achieve a level of quality.

Additional questions surface about whether the views of other criminal justice players should be surveyed. Judges, prosecutors, court personnel, probation officers all see aspects of the lawyer's performance and can offer an assessment. The input from these sources, however, may be biased given their competing concerns. For example, judges interested in moving a calendar may see a lawyer's adversarial posture as problematic because she contests every issue on behalf of her clients. Obviously, such an assessment would need to be judged based on what the defense community considers to be the

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229. Belden Russonello & Stewart, NLADA, Americans Consider Indigent Defense: Analysis of a National Study of Public Opinion (2002) (on file with the Fordham Law Review), http://www.nlada.org/Defender/Defender_Awareness/Defender_Awareness_Indigent (last visited Feb. 21, 2003).

230. *See "The Best Defense Is No Offense"*, *supra* note 126, at 2 n.4. For example, the polling data revealed that a majority of respondents believed that low-income people accused of crime should be guaranteed by the government (1) resources for DNA testing (68%); (2) a lawyer with a small caseload (57%); (3) resources to hire investigators (55%). *See* Belden Russonello & Stewart, *supra* note 229, at 3.

231. In 1988, I participated as a consultant examining the Fulton County Public Defender office in Atlanta, Georgia. The office was crippled due to case overload and underfunding. The evaluation team recommended the use of coalitions involving the bar or Blue Ribbon Task Forces as a way to bring greater attention to the needs of the indigent defense community. *See generally* Peter Appelbome, *Study Faults Atlanta's System of Defending Poor*, N.Y. Times, Nov. 30, 1990, at B5.

232. J. Michael McWilliams, *The Erosion of Indigent Rights*, 79 A.B.A. J. 8 (Mar. 1993).

appropriate role of the defense lawyer. Similarly, probation officers might complain that defense lawyers spend too much time contacting them and trying to color their view of the client. Such critiques may in fact indicate that the defender is performing her role as she should. But a carefully structured survey instrument could seek information from these actors that could provide valuable information. Assessments of the lawyer's preparation, clarity of presentation, timeliness and knowledge of the law may be tremendously helpful.

Any evaluation of whether the lawyer has succeeded in providing quality in her representation of clients would seem to require input from peers. The health care profession has utilized peer review as a key part of its effort to maintain quality in the care that physicians provide.[233] Crucial components of a peer review system appear to be that the charge of such systems would not be to monitor ethical violations as bar counsel might. Rather, the focus of such a review would need to steer clear of ethical questions and focus solely on improving the quality of practice.

With that goal in mind, confidentiality would seem an essential prerequisite.[234] Candor between the lawyer being reviewed and the reviewers would go a long way toward the goal of understanding what may have happened in the course of representation as well as ultimately lifting the level of practice. But the sole reason for developing a peer review system would be to provide a vehicle for conversation among peers about practices that might fall below a quality threshold and that might, therefore, be changed. There are obvious drawbacks in any effort to set standards, canvass the views of others, and impose the burden on defense lawyers to meet the requirements that might be set. Defense lawyers may already feel that they are under sufficient pressure from courts, clients and the bar to maintain effective assistance. They may also worry that if the information is examined by peers or, as a result of surveys, is not kept confidential that it could be used by a variety of parties against the lawyer. The disciplinary arm of the bar or clients might be prompted to raise claims against the lawyer because of information learned through a mechanism that was originally designed as a practice aid.[235] Moreover, the peer review process might raise concern if the guidelines under which it operated permitted too much latitude in determining what constitutes quality. For example, a review panel

233. *See* Christopher S. Morter, Note, *The Health Care Quality Improvement Act of 1986: Will Physicians Find Peer Review More Inviting?*, 74 Va. L. Rev. 1115 (1988) (discussing the historical development of peer review in the medical profession); Katherine T. Stukes, Note, *The Medical Peer Review Privilege After* Virmani, 80 N.C. L. Rev. 1860, 1862-64 (2002) [hereinafter Stukes, *Medical Peer Review*] (describing how peer review operates within the medical profession).

234. *See* Stukes, *Medical Peer Review*, *supra* note 233, at 1862-63 (discussing the importance of confidentiality in making peer review work).

235. *Id.* (discussing this problem in the context of the medical profession).

could conceivably choose to impose a certain style of lawyering on the defense lawyers it reviews or to mandate a uniformity of practice. But careful guidelines about what the lawyer should provide could avoid the potential to single out a lawyer who happened to diverge from the norm, but also provided aggressive and effective representation through the use of unfamiliar or unorthodox methods.

3. Appealing to a Broader Audience

Identifying the components of quality by establishing benchmarks is in part an internal conversation for the defense community. Indigent defense service providers must decide for themselves how to conceive of quality and how to provide it. But the quality message necessarily includes an external component. The public must come to appreciate the value of quality in criminal defense so that it can resist the impulse to narrow the right. Because defenders often feel reluctant to take public positions, particularly in the midst of controversy, they may question the wisdom of participating in the larger public dialogue about quality defense.[236] A high profile can open defenders to attack. Still, taking themselves out of the conversation may exact too great a price, sacrificing any meaningful right to counsel.

In fashioning the public message to deliver in this context, defenders should seek common ground between their clients and the public. Rather than permitting the narrative that the lawyer representing an accused stands in opposition to the public or the public's safety to survive, defense lawyers will need to craft a message that binds groups rather than highlights differences. Defenders should tap shared values as they appeal to the public, noting that defense counsel protects all individuals, including the innocent, against the unrestrained power of the state. Indeed, defenders may need to take the message further, warning the public that the loss of effective representation of the individual accused could begin to unravel the democratic fabric.

This is not just hyperbole. Once any government discovers that it can withdraw individual rights without consequence, it is but a small step to future incursions. Depriving an individual of effective representation when her life or liberty hangs in the balance is a frontal assault on the democratic freedoms that the society cherishes. But such an enormous assault is often a mere prelude to suspending rights to speech and other liberties. Arguments that the crisis environment justifies the suspension of fundamental liberties offer immediate but false comfort to a public fearing for its safety. Indeed, the pattern is all too familiar. A government engages in overzealous prosecutions of

236. *See* Lisa J. McIntyre, The Public Defender (1987) (noting in a study of the Cook County Public Defender Office that defenders tended to embrace a degree of invisibility so as to position themselves below the political radar screen).

those individuals and groups in the unenviable position of being the least powerful and most distrusted. Once the public tolerates disposing of rights for some, the rights of the rest are in peril.

Given the stakes, quality in representation is nothing less than imperative. The accused requires effective protection in her individual fight for life or liberty. Anything less threatens democracy. Quality must also be assured at the level of the criminal justice system. Preventing individual encroachments of rights helps to stem a tide leading to the dissolution of rights for everyone. When counsel operates as the check on overzealous prosecution as it should, then the average citizen can feel more secure.

How can the defense community convey this message to the public? It can begin by participating in the larger dialogue about crime. This means developing a relationship with the media such that indigent defense service providers are among the array of players who typically opine about issues of crime and justice. They must not only respond to any attacks on the right to counsel, but should also affirmatively work to shape the conversation and perceptions about the significance of quality in making representation effective. In wresting the definition of quality in representation away from others with competing interests, the defense community can make clear its message that quality is important. The public dialogue, in turn, will help to set public expectations about what they should receive and will help to educate the larger community about the dangers of providing less than that to which they are entitled.

CONCLUSION

As the nation grapples with new threats to its security, there may be considerable pressure to constrict fundamental rights like the right to counsel as a temporary measure during a particular crisis. But too often, irreparable damage can occur in the course of the temporary fix. As importantly, once a government has determined that certain rights can be suspended, it is often quite difficult to return to a landscape that refuses to tolerate any suspensions of rights. Unless the defense community takes this opportunity to define what it does and to insist that nothing less than quality in representation will suffice, then much of the right to counsel could effectively evaporate with little notice or noise.

The Supreme Court charted a path to *Gideon* that trumpeted the importance of counsel effectively representing the individual. Although the states' experience with the appointment of counsel since *Gideon* has muted what the Court seemed to intend in its Sixth Amendment jurisprudence, the defense community has an obligation to raise its own performance and standards to fulfill the original mandate.